

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

STUDENTS FOR FAIR ADMISSIONS,)
Plaintiff,)
vs.) Civil No.
THE UNITED STATES NAVAL) 1:23-cv-2699-RDB
ACADEMY, ET AL.,)
Defendants.) September 5, 2024
10:07 a.m.

THE ABOVE-ENTITLED MATTER CAME ON FOR
MOTIONS HEARING AND PRETRIAL CONFERENCE
BEFORE THE HONORABLE RICHARD D. BENNETT

A P P E A R A N C E S

On Behalf of the Plaintiff:

ADAM K. MORTARA, ESQUIRE
PATRICK STRAWBRIDGE, ESQUIRE
J. MICHAEL CONNOLLY, ESQUIRE
CAMERON T. NORRIS, ESQUIRE
JAMES HASSON, ESQUIRE
R. GABRIEL ANDERSON, ESQUIRE
THOMAS R. MCCARTHY, ESQUIRE

On Behalf of the Defendant:

JOSHUA E. GARDNER, ESQUIRE
CATHERINE M. YANG, ESQUIRE
ANDREW E. CARMICHAEL, ESQUIRE
JOHN ROBINSON, ESQUIRE
MEDHA GARGEYA, ESQUIRE
CHRIS E. MENDEZ, ESQUIRE

(Computer-aided transcription of stenotype notes)

Reported by:

Ronda J. Thomas, RMR, CRR
Federal Official Reporter
101 W. Lombard Street, 4th Floor
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1 (10:07 a.m.)

2 **THE COURT:** Good morning, everyone. You all may be
3 seated for a few minutes. This is calling the case of Students
4 for Fair Admission v. The United States Naval Academy, et al.
5 Civil No. RDB-23-2699.

6 We're here for a motions hearing as well as then a
7 pretrial conference for the bench trial that's on schedule to
8 start on Monday, September the 16th. I want to welcome
9 everyone here.

10 The masking policies of this court have previously
11 required that masks are worn in all public areas of the
12 courthouse. That is no longer the case. But we do -- it is
13 within the discretion of the presiding judge and given that we
14 still have vestiges of COVID-19 that drift in and out of this
15 courthouse, I do inquire the vaccination status of those
16 parties before me. And Ms. Herndon, ever-vigilant deputy
17 courtroom clerk has already checked, and apparently everyone
18 here has been vaccinated. And that's fine. No big deal. But
19 I just hand masks out. So we've all been vaccinated and
20 boosted so that's fine.

21 With that, let me clarify on the record who is here and
22 also we'll go over the order which I'd like to hear these
23 arguments if we can on four outstanding motions. And then
24 we're going to address the pretrial order today.

25 So, with that, on behalf of the Plaintiff Students for

1 Fair Admission, who is here?

2 **MR. STRAWBRIDGE:** Good morning, Your Honor. Patrick
3 Strawbridge.

4 **THE COURT:** Yes, Mr. Strawbridge. Nice to see you.
5 Welcome.

6 **MR. MORTARA:** Good morning, Your Honor. Adam Mortara.

7 **THE COURT:** Mr. Mortara, nice to see you.

8 **MR. CONNOLLY:** Good morning, Your Honor, Michael
9 Connolly.

10 **THE COURT:** Mr. Connolly, nice to see you.

11 **MR. NORRIS:** Good morning, Your Honor, Cameron Norris.

12 **THE COURT:** Cameron Norris, yes, nice to see you.

13 Particularly, the person who's the furthest out usually
14 has done the most work, Mr. Norris. So it's nice to have you
15 here.

16 **MR. MORTARA:** Well, Your Honor, we have a back row
17 too.

18 (Laughter.)

19 **THE COURT:** Okay. The ones in the back row generally
20 have really brought it to the fore. So who is back there?
21 Mr. Hasson; is that right?

22 **MR. HASSON:** That's correct, Your Honor. James
23 Hasson.

24 **THE COURT:** Nice to have you here, and welcome to you.

25 **MR. ANDERSON:** Good morning, Your Honor. My name is

1 Gabriel Anderson.

2 **THE COURT:** Nice to have you here, Mr. Anderson, and
3 welcome.

4 **MR. MCCARTHY:** Good morning, Your Honor, Thomas
5 McCarthy.

6 **THE COURT:** Yes, Mr. McCarthy, nice to have you here.
7 The whole team is here. The only person listed as counsel who
8 is not here is Brian Weir; is that correct? Okay. Other than
9 that -- he doesn't need to be here.

10 **MR. STRAWBRIDGE:** He regrets that he is missing this
11 proceeding.

12 **THE COURT:** That's quite all right. That's quite all
13 right.

14 And on behalf of the Defendants, United States Naval
15 Academy and the Department of Defense, and Secretary Austin,
16 and Secretary of the Navy Carlos Del Turo, and Dean of
17 Admissions for the Academy Bruce Latta, and Rear Admiral
18 Kacher, the Acting Superintendent of the Naval Academy.
19 They're the six listing Defendants. I'll just refer to it as
20 the generally as the Academy.

21 Who is present?

22 **MR. GARDNER:** Good morning, Your Honor, Josh Gardner
23 with the United States Department of Justice on behalf of the
24 Defendants. With me today are my co-counsel, Catherine Yang,
25 Drew Carmichael, John Robinson, Medha Gargeya and Chris Mendez.

1 **THE COURT:** Nice to have all of you here, and welcome,
2 so you didn't have to go through it. I gather that --
3 Ms. Gargeya, nice to have you here. Who's further out than
4 you, Mr. Mendez; is that right? Yeah, then you've obviously
5 done a lot of work as well. I always try to make sure --

6 **MR. MENDEZ:** Your Honor, it's definitely a team
7 effort.

8 **THE COURT:** That's fine. I won't impose the rule yet
9 but sometimes I require that they let someone in the far out
10 speak in some way at the podium, but we're not going to enforce
11 that yet today.

12 Let me just note how I would like to approach this. There
13 are four motions pending. There's the Plaintiff's Motion for
14 Partial Summary Judgment in this matter, specifically, on the
15 issue of Article III standing and the position of the
16 Plaintiffs that can be resolved as a matter of law. That's
17 Paper Number 74.

18 And then there is the second of the -- I want to address
19 that first this morning, in case you all divided up these
20 arguments. Let me explain how I'd like to do it.

21 The Motion for Summary Judgment on the standing issue
22 first. Then the Plaintiffs' Motion in Limine to Exclude
23 Certain Testimony of Captain Birch from the Navy SEALs. That's
24 Paper Number 87. I'll address that secondly.

25 And then thirdly today we'll address Defendants' Motion in

1 Limine regarding Plaintiff's expert witnesses, Paper Number 85.

2 And then the fourth and last will be the Defendants'
3 Motion in Limine concerning certain exhibits, Paper Number 86.
4 All of which were filed timely within the last few weeks.

5 And then finally we'll get to the matter of the joint
6 proposed pretrial order and any issues that flow from that.

7 Unless there's any objection, I'd like to approach it in
8 that fashion. Whoever has the sum of the argument on those
9 issues you can stay at the table, as you recall from the motion
10 for preliminary injunction. You can stay at the podium.
11 Whatever suits your pleasure.

12 So, with that, I'll be glad to hear from Plaintiff's
13 counsel with respect to the Motion for Partial Summary
14 Judgment, Paper Number 74. And through that motion the
15 Plaintiff, Students for Fair Admissions, has insisted that the
16 issue of Article III standing can be resolved as a matter of
17 law.

18 And, briefly, Students for Fair Admission contends -- I'll
19 interchangeably go SFFA or I'll go Students for Fair
20 Admissions -- insists, contends that there's no question that
21 at least one of its four proffered Members could sue on his
22 own, which is all that's necessary for associational standing.
23 And the Defendants contend that there are disputed factual
24 issues as to whether the Members are able and ready to apply to
25 the Naval Academy and as to how the Naval Academy's admissions

1 process works. And then the Plaintiff essentially has argued
2 that any disputes over the admissions process don't relate to
3 standing per se.

4 So that's essentially, I think, in a nutshell what the
5 arguments are here.

6 With all of these, these have been very thoroughly
7 briefed. And I'll be glad to hear from you, Mr. Norris on
8 this.

9 What I'd prefer, you may recall from the hearing on the
10 Motion for Preliminary Injunction, I tend to have what's called
11 a hot bench, I guess. I ask questions. And I may get to an
12 issue and want a response and we try to narrow it down.

13 I'll give certainly an indication today from the bench as
14 to how I'm going to rule on this. And I'll follow-up with a
15 brief memorandum order on that.

16 So, with that, Mr. Norris, I'll be glad to hear from you.

17 **MR. NORRIS:** Thank you, Your Honor. We do believe
18 that standing should be resolved as a matter of law in this
19 case just like it has been in all SFFA's cases.

20 My friends do try to say that this case is different but
21 their arguments in our view all misunderstand the law of
22 standing in these types of cases; and even under their
23 arguments we don't think there's a genuine factual dispute at
24 least as to Members A and D that we put forward.

25 So the cases in this area of the law --

1 THE COURT: Did you say A and D as in dog.

2 MR. NORRIS: Yes.

3 THE COURT: Okay. All right.

4 MR. NORRIS: The first and last members.

5 THE COURT: Yes, yes.

6 MR. NORRIS: The case law in this area says we have to
7 prove two things for standing: One is that the Naval Academy
8 uses race in its admissions process, which is conceded; and,
9 two, that we have a member who is able and ready to apply to
10 the Naval Academy if it were to stop using race, which we don't
11 think is genuinely disputed anymore at this stage.

12 My friends say we have to prove more than that, but even
13 if you did take their arguments as true, I just want to
14 highlight how their arguments don't even affect Member D, in
15 particular, as in dog.

16 They say that our Members -- they have questions about
17 whether they have an intent to reapply to the Naval Academy
18 again. Member D is reapplying to the Naval Academy right now
19 for this cycle.

20 THE COURT: Class of 2027; is that right?

21 MR. NORRIS: This would be the class of 2029 --

22 THE COURT: '29, okay.

23 MR. NORRIS: -- I believe or 2028. I may have that
24 wrong. But whichever one that the due date is January 31st of
25 next year, he is applying right now, is almost done with his

1 application.

2 My friends say that our Members might be disqualified
3 either medically or academically. They don't say that about
4 Member D. His qualifications are undisputed. He was found to
5 qualify when he did apply, as Your Honor mentioned, to the
6 class of 2027. They don't have any dispute about his
7 qualifications now.

8 My friends also say that some parts of their process do
9 not consider race, but Member D's congressman uses the type of
10 nomination method that does consider race, even according to
11 the Naval Academy. And his last application for the class of
12 27 concededly went through a process that used race because he
13 was denied admission despite being found qualified, which
14 necessarily means he did not get an LOA where they used race,
15 he did not get an additional appointment where they use race,
16 he did not get a superintendent nomination where they use race.
17 He was denied and race affected his process.

18 **THE COURT:** And you're proffering that Member D is
19 receiving one of the two types of nominations, a statutory
20 nominating authority, i.e. a member of Congress.

21 **MR. NORRIS:** Last time he did. He's still working on
22 getting his congressional nomination for this time, but I
23 believe he's going back, as he testified in his deposition, to
24 the same member of Congress that nominated him before.

25 It's called the competitive method of nominations. It's

1 what 65 percent of Congress members use when they nominate
2 people to the Academy.

3 So I'll just talk briefly, Your Honor, unless you'd like
4 to go somewhere else, about their ability and readiness to
5 apply, we think, is defined correctly as those statutory
6 minimum requirements for admission to the Naval Academy. So
7 you have to be unmarried, you can't have kids, you can't be
8 over a certain age, you have to be a citizen, things like that.
9 That is conceded in this case. There is no dispute about those
10 minimum qualifications.

11 Now, they like to talk about the possibility of a medical
12 or an academic disqualification. Again, that's not an argument
13 they can make with respect to Member D and it's not an argument
14 they can make with respect to Member A.

15 Member A, when he applied last time, was found medically
16 disqualified. But that condition no longer counts as a medical
17 disqualification under DoD's regulations. We know that because
18 he's a member of the Navy ROTC at his college where he's
19 receiving a waiver for the exact same condition.

20 **THE COURT:** He now a rising junior -- Member A is
21 white and is a rising junior at [REDACTED]
22 [REDACTED].

23 **MR. NORRIS:** Just started his junior year.

24 **THE COURT:** And he's in Navy ROTC. And then Member D
25 is also white. Do I understand he's attending [REDACTED]

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1 | 00000; is that right?  Where is he in school?  Is it a male or
2 | female?
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3 MR. NORRIS: All four are males, Your Honor. He was
4 signed up to attend the [REDACTED] as part of their
5 ROTC Program. That didn't work out. He is now enrolled I
6 believe at [REDACTED]. Just started as a
7 freshman. Just walked into the door on campus.

8 THE COURT: Okay.

9 **MR. NORRIS:** Which brings me to my next point, my
10 friends on the other side doubt their intent to reapply.
11 Member D is reapplying. He's just a freshman in college. It's
12 not unusual at all for people in his position to reapply to the
13 Academy.

4 In fact, the Academy loves to get people like that because
5 it shows they're really committed to the Academy because they
6 apply twice. They actually give them a preference in the
7 admissions process. And so you don't have to speculate about
8 his future intent, he is currently reapplying for the Naval
9 Academy. Makes it an easy case.

20 But with respect to all of our Members, they all clearly
21 testified over and over that they would reapply, either now for
22 Member D or hypothetically in the future for the other three,
23 if the Academy were ordered to stop using race. There is no
24 contrary evidence in the record --

25 THE COURT: Just so we're clear on this, Mr. Norris, I

1 thought Member A had testified at the deposition that he likes
2 the programs at [REDACTED] and at least proffered that perhaps he
3 has really no reason to transfer. And if he were to transfer,
4 his graduation officer commission would be delayed by at least
5 three years.

6 Isn't that in the record as to Member A?

7 **MR. NORRIS:** Member A was talking about why he
8 wouldn't transfer to another civilian college. The transcript
9 goes on to say, well, what about the Naval Academy? He said,
10 "That's different."

11 **THE COURT:** Okay.

12 **MR. NORRIS:** "I would transfer to the Naval Academy
13 even though it would make me start over."

14 And he gave specific reasons why. He said, "that would
15 save me a whole year's worth of college tuition, which I'm
16 currently paying myself. It would put me in the Naval
17 Academy," which is a lot -- it's a very prestigious
18 institution. It's a good way to get into the Navy as an
19 officer. And he said the networking opportunities that you get
20 from being a student at the Academy are unparalleled.

21 Those are all reasons he would reapply if they were
22 ordered to stop using race.

23 That's very clear testimony about the Academy in
24 particular.

25 The other testimony that my Friends cite, and Your Honor

1 just referenced, was not about the Academy. It was about
2 college in general.

3 **THE COURT:** Just so we're completing the record here,
4 before we get back to Member A and Member D. Member B, as I
5 understand it, is Asian and is a [REDACTED] at the
6 [REDACTED], correct?

7 **MR. NORRIS:** Correct.

8 **THE COURT:** Okay. He's now majored in biochemistry
9 and he's still at the [REDACTED] as we speak,
10 starting this semester now; isn't that right?

11 **MR. NORRIS:** Yes.

12 **THE COURT:** All right. And then Member C is a [REDACTED]
13 [REDACTED] as well and a [REDACTED] at [REDACTED],
14 and Member C, it appears, may have expressed some reluctance to
15 reapply in that he would be very -- his commission, graduation;
16 date would be transferred. Is that a fair summary?

17 I note you haven't mentioned B and C yet. I'm just making
18 sure the record is complete here. As to B and C, your position
19 is that the record reflects that they would, in fact, reapply.
20 Is that what you're saying? They have not, but they would.

21 **MR. NORRIS:** They would if the Academy were ordered to
22 stop using race, yes, Your Honor. That specific testimony
23 about the Academy is unrebutted.

24 **THE COURT:** Okay.

25 **MR. NORRIS:** There is some testimony about why they

1 haven't looked at transferring generally to other places. But
2 both students said, the Naval Academy is my number one choice.
3 Member C was asked specifically, well, "What about the fact
4 that you would have to start over?" And he said, "Doesn't
5 matter. That concern would be overcome by my desire to attend
6 the Academy in particular."

7 **THE COURT:** Okay. You can go back to Member A and D.
8 I didn't mean to cut you off. I was just trying to make sure
9 we were complete on the record here.

10 **MR. NORRIS:** I like all of our Members, but I think A
11 and D are the closest call, closest case for summary judgment.

12 **THE COURT:** Okay.

13 **MR. NORRIS:** Your Honor, I think the next argument,
14 I'll move on to their admissions process. You can assume that
15 everything they say about their process is correct, and we
16 still have standing at the summary judgment stage. That's
17 because the injury in these types of cases stems from the fact
18 that the admissions process uses race at all, at any point in
19 the admission process. That creates an injury because the
20 injury is not keyed to whether they will likely get in. It is
21 keyed to whether they have an equal opportunity to compete
22 before they even apply. They do not have an equal opportunity
23 to compete if race is used at all in the process.

24 We don't even have to prove that they will apply, just
25 that they are ready and able to apply if the Academy were

1 ordered to stop using race. So it's a hypothetical question.
2 It does not turn on what will, in fact, likely happen to their
3 future application.

4 We also don't have to prove that race affected their
5 application last time they applied. The only reason that last
6 time is relevant to a case seeking forward-looking relief, is
7 that it really helps cement their intent to reapply.

8 In *Gratz*, the Supreme Court said, well, they've applied
9 before so of course we can assume that their stated attempt to
10 apply again is sincere. They've already demonstrated it
11 through their actions.

12 We also don't have to prove -- the Government's position
13 is that we have to prove -- we have to prove that it is likely
14 that race would affect the future application that they file.
15 That argument is clearly rejected in *Parents Involved* by the
16 Supreme Court. There was a group of middle-schoolers who were
17 concerned that their race would be a reason that they were sent
18 to a different high school. And the Supreme Court -- and the
19 city in that case said, they don't have standing because you
20 don't actually get sent to a different high school based on
21 race unless a bunch of conditions are true: Like, the high
22 school that you're currently assigned to is oversubscribed by
23 race or something like that. We don't know whether those
24 future conditions will hold for each one of these middle
25 schoolers.

1 The Supreme Court said it does not matter. You have a
2 race-based system and a risk of harm to you that you may be
3 prejudiced by your race. That is all that is required.

4 Again, you can assume everything they said is correct and
5 we would still have standing.

6 This is also not different from *Harvard*, Your Honor, where
7 the Supreme Court and the District Court said we have standing
8 at the summary judgment stage. For *Harvard*, very competitive
9 school, 80 to 90 percent of applicants have about a zero
10 percent chance of getting in. The curve looks like this
11 (indicating) where the people who are competing for spots are
12 really like that last 10 percent of the class.

13 So race didn't affect most applicants to Harvard either.
14 If you have a zero percent chance, a race-based tip is not
15 going to help you, it's still zero. But still, no one ever
16 inquired about the qualifications of our standing Members, no
17 one asked about their GPA or SAT scores, anything like that.
18 The qualifications weren't relevant. It was their desire to
19 compete and not be treated differently on the basis of their
20 race that creates the injury in these cases.

21 **THE COURT:** Mr. Norris, just so we're clear, going
22 step by step here in terms of Article III standing, what's
23 being invoked here is essentially associational standing,
24 correct, for SFFA?

25 **MR. NORRIS:** Correct.

1 **THE COURT:** In terms of, which means that -- really,
2 the only real dispute here is with respect to the first element
3 and that's if the Members would otherwise have standing to sue
4 in their own right. That's the thrust of what we're dealing
5 with here.

6 **MR. NORRIS:** Correct. And only the first element of
7 the first element I believe -- whether they have an injury.

8 **THE COURT:** I understand. And that's why we have the
9 focus on the Members. And *Gratz* and I think the later case
10 *Carney v. Adams*, after *Gratz*, essentially has to do with as
11 long as there's some indicia that they're ready and able, the
12 Supreme Court has not required that there actually have been a
13 reapplication is the argument you're making.

14 **MR. NORRIS:** Correct. *Carney* discusses *Gratz* --

15 **THE COURT:** Yes.

16 **MR. NORRIS:** -- and says *Gratz* is completely correct.
17 If you are challenging the use of race and admissions, all you
18 have to show that you applied once before, were denied, you're
19 ready and able to apply again should they stop using race.
20 We've got that.

21 This is more of a technical argument but it's the last
22 thing and then I'll stop here, Your Honor.

23 We have a dispute with them about the mechanics of their
24 process and where they do and don't use race. We're not
25 talking about the merits. We're talking about standing for

1 purposes of this motion. We think the courts have to assume
2 that we're correct on those factual disputes on the merits when
3 assessing standing, which means you assume that our view of
4 their admissions process, which is they use race throughout at
5 every stage is true, just for purposes of deciding standing.

6 **THE COURT:** Just so we're clear, in terms of -- SFFA
7 in some situations perhaps assert its own standing in terms of
8 its own injury, but that's not really what's being alleged
9 here. It's clearly associational standing and it really is
10 with respect to the matter of its Members who would otherwise
11 have standing to sue in their own right. That's the whole
12 basis of it.

13 **MR. NORRIS:** That's correct. It's associational
14 standing, Your Honor.

15 **THE COURT:** Okay. Thank you very much, Mr. Norris, on
16 this. I'll be glad to hear from defense counsel.

17 And with that, we have Mr. Carmichael; is that right?

18 **MR. ROBINSON:** Robinson. Close.

19 **THE COURT:** Mr. Robinson. Yes, Mr. Robinson, nice to
20 have you here.

21 **MR. MORTARA:** Your Honor, if I may.

22 **THE COURT:** Sure. Go right ahead. Mr. Mortara.

23 **MR. MORTARA:** Adam Mortara for Students for Fair
24 Admissions. In response to some of the Court's questions,
25 Mr. Norris revealed specific schools that our Members are

1 attending.

2 **THE COURT:** Yes.

3 **MR. MORTARA:** Some of that information could be used
4 to identify them. We would move that those small portions be
5 sealed.

6 **THE COURT:** That's fine. To that extent, we'll take
7 all precautions on that. I don't know that that's really a
8 threat but that's fine. And Ms. Thomas is excellent on that,
9 the court reporter. She never misses a beat on that. We'll
10 make sure that done on the record here as well, sure.

11 **MR. MORTARA:** Thank you very much, Your Honor.

12 **THE COURT:** Sure, sure.

13 Mr. Robinson, I'll be glad to hear from you.

14 **MR. ROBINSON:** Good morning, Your Honor.

15 **THE COURT:** Good morning.

16 **MR. ROBINSON:** We do believe that there are genuine
17 disputes of material fact here that would preclude the Court
18 awarding summary judgment. We have a cross meant for summary
19 judgment. We're not talking at this point about the merits
20 determination on -- trial determination on standing, but we do
21 think that there are material disputes of fact. And we also
22 think there's no need for the Court to decide this issue at
23 this point two weeks before trial when the Court will soon have
24 a full evidentiary record before it both on the Members'
25 ability and readiness to apply as well as on the Naval

1 Academy's admissions process, how it works, and the limited
2 ways in which the Naval Academy considers race in that process.

3 So I'll take both of those points in turn, sort of the
4 disputed facts and the judicial economy point.

5 There are two categories of disputed facts here. First,
6 there are disputed facts as to whether each of Plaintiff's
7 Members are able and ready to compete for a spot at the Naval
8 Academy. That's an inquiry that the Supreme Court in the
9 *Carney* case says is a highly fact-intensive inquiry; and,
10 second, there are disputed facts as to how the Naval Academy's
11 admissions process works. Their position is that race is
12 considered throughout the process, that it's a pervasive
13 consideration. It makes a difference for the vast majority of
14 candidates. Our position is that it's a much more limited
15 consideration. And we'll put on witnesses to explain how it
16 works at trial.

17 As to Plaintiff's Members, we've identified a number of
18 reasons why we think a reasonable fact-finder could conclude
19 that those Members are not, in fact, able and ready to compete
20 for a spot at the Naval Academy. So I'll just go through them
21 briefly.

22 Members B and C, as was discussed with my colleague, were
23 found to be academically not qualified when they applied to the
24 Naval Academy previously.

25 Our position, although it is a disputed issue of fact, is

1 that race plays no role whatsoever in that academic
2 qualification decision. That --

3 **THE COURT:** Clearly, the law is that only one of its
4 Members has to have suffered an injury in fact to have
5 appropriate standing on their own. They don't have to prove
6 all four. They just have to prove or just offer a proffer as
7 to one of the four, correct?

8 **MR. ROBINSON:** That is absolutely correct. Yes. But
9 just to go through them. So B and C were found to be
10 academically not qualified. Our contention is that race plays
11 no role in that process factually and that trial will establish
12 that.

13 There is no basis in the evidence for the Court or a
14 fact-finder to conclude that if they were to reapply, the
15 Admissions Board would reverse itself and conclude that, in
16 fact, they are academically qualified. And, so because race
17 plays no role in that process, they would never have to compete
18 on an unequal footing against other applicants.

19 On Page 6 of their reply brief, they note that academic
20 disqualification doesn't guarantee a disqualification in the
21 future. And of course that's true. If this were a trial
22 setting, the Court could weigh the evidence and consider that.

23 But this is a Motion for Summary Judgment. They have to
24 show there are no issues of disputed fact. And in that
25 context, we're dealing with probabilities. They have the

1 burden to prove that it's more likely than not that race will
2 be considered as to these Members, and we think that there are
3 at a minimum disputed factual issues as to whether these
4 Members B and C are able and ready to apply.

5 **THE COURT:** As I understand it, B did not complete the
6 medical evaluation?

7 **MR. ROBINSON:** Correct.

8 **THE COURT:** And C did complete the medical evaluation,
9 but was deemed to be medically disqualified?

10 **MR. ROBINSON:** Correct. I believe Member C applied
11 twice and on one occasion he was found to be medically
12 disqualified due to a recent surgery, correct. Yes.

13 **THE COURT:** All right.

14 **MR. ROBINSON:** Now, Members A and D, we think they're
15 also genuine disputes of material fact. So Member A is a -- as
16 to their readiness and ability to compete for a spot. So
17 Member A is currently a junior. So if he were to apply and go
18 through all that an application entails, which includes a
19 candidate fitness assessment, a medical examination, getting a
20 nomination from a Congress person, sitting down for an
21 interview, filling out a personal statement, getting
22 recommendations. If he were to do all of that, and if he were
23 to be accepted, he would be delaying his graduation by at least
24 three years.

25 **THE COURT:** As to Member A, Mr. Robinson, he is now an

1 active member of [REDACTED] -- I'll refer to it as [REDACTED] --
2 at [REDACTED], correct?

3 MR. ROBINSON: Correct.

4 THE COURT: So what is -- there is no issue in terms
5 of potential medical disqualification.

6 MR. ROBINSON: Well, we think that cuts both ways.

7 THE COURT: How are you able a member of Navy ROTC and
8 you're not medically qualified to be at the Academy. I don't
9 understand that?

10 MR. ROBINSON: So he was found to be medically
11 disqualified when he applied to the Naval Academy --

12 THE COURT: Yes, I understand.

13 MR. ROBINSON: -- due to a chronic skin condition.

14 THE COURT: Yes.

15 MR. ROBINSON: He did get a waiver for the ROTC
16 program. My understanding is he would need to sit for a
17 medical exam again because those medical exams are only good
18 for two years.

19 So I'm not suggesting that, you know, the Court weighing
20 all of the evidence would necessarily conclude that that
21 precludes him from applying. But I am saying that it is part
22 of one of the disputed factual issues that would preclude an
23 aware of summary judgment.

24 THE COURT: Just so the record is clear, I'm not sure
25 how there's going to be a disputed factual issue. To be

1 perfectly blunt about it, I'm hard-pressed to understand how
2 someone can be in Navy ROTC and be deemed to be qualified as an
3 officer and yet they're not medically qualified for the
4 Academy. There's no factual issue for me to address. It's
5 very simple --

6 **MR. ROBINSON:** And we're not really --

7 **THE COURT:** It's very simple. Medical
8 disqualification on Member A is just not a factor here.

9 **MR. ROBINSON:** Sorry, just to be clear, we haven't
10 really pushed the medical issue --

11 **THE COURT:** As well you should not. Member A is not
12 medically disqualified. That's off the board because he's in
13 Navy ROTC. So that's no longer relevant in any way, shape, or
14 form to me as a finder of fact.

15 **MR. ROBINSON:** I do think the ROTC point cuts both
16 ways --

17 **THE COURT:** We have so many issues to recover, we
18 don't need to debate this, Mr. Robinson.

19 **MR. ROBINSON:** Sure, sure.

20 **THE COURT:** It seems patently obvious to me that
21 that's hardly an argument that the Academy should be making,
22 quite frankly, it seems to me.

23 **MR. ROBINSON:** Sure. And to be clear, I wasn't making
24 it --

25 **THE COURT:** Sure.

1 **MR. ROBINSON:** The main argument is that he will be
2 postponing his graduation by three years. He's already
3 scheduled to graduate as an officer in the Navy next year. So
4 we think a reasonable fact-finder looking at that could
5 conclude that he is not likely to undergo everything that an
6 application entails, postpone his graduation and commissioning
7 as an officer by at least three --

8 **THE COURT:** But the test is really whether he's ready
9 and able. It's up to him to make the career choice it seems to
10 me. I don't really know how that is a particularly strong
11 point either.

12 In terms of some of the statistics I've already seen, it
13 clearly -- it certainly appears that as you go up the track, I
14 think, what is it, I think 91 percent of all the chiefs of
15 naval operations have been Academy graduates, nine percent have
16 not. So it may be important to someone that is anticipating a
17 Navy career that they want to be an Academy graduate as opposed
18 to a ROTC officer.

19 **MR. ROBINSON:** Sure. And if the Court were evaluating
20 all the evidence of a -- reviewing it in the trial setting that
21 would be a perfectly appropriate conclusion for the Court to
22 make.

23 But in this setting, they moved for summary judgment so
24 they need to show not only that there are no disputes of facts
25 as to his ability and readiness to compete for a spot, but also

1 he would be subjected to an unequal process if he were to
2 apply. And that's a second category of disputed factual issues
3 that we think would preclude summary judgment here because our
4 position is that race does not play a role in several stages of
5 the Academy's admissions process.

6 So, for example, it doesn't play a role in terms of
7 getting a congressional nomination. It doesn't play a role in
8 terms of the medical exam. It doesn't play a role in terms of
9 the candidate fitness assessment. It doesn't play a role for
10 certain individuals who are nominated by congressman under the
11 principal nominee alternate-ranked system because there the
12 Academy just has to go down in order.

13 So without resolving the factual dispute between the
14 parties about how and the extent to which race is considered at
15 these various processes, we don't see how the Court could
16 decide as a matter of law that they are both ready and able to
17 apply and that they will be subjected to an unequal process.

18 But perhaps most importantly, there's just no need for the
19 Court to resolve that question now. The Court has discretion
20 under the *Anderson v. Liberty Lobby* case that we cited to just
21 defer this issue until after trial. No efficiencies would be
22 gained by deciding the issue now. We have already designated
23 deposition testimony for these witnesses. We would simply
24 submit that to the Court, and the Court would decide the issue
25 in the context of the findings of fact and conclusions of law

1 where the Court would be free to weigh the evidence, make
2 credibility determinations, resolve factual disputes.

3 We also will need to go through the Naval Academy's
4 admissions process regardless discussing the ways in which race
5 is addressed. And so there's no time that would be saved at
6 trial by deciding this issue now. No efficiencies would be
7 gained and, you know, the Court would have to review the
8 deposition transcripts now to test whether there are genuine
9 disputes of material fact. And we just don't see a reason to
10 do that at this stage when we have a trial coming up in two
11 weeks.

12 **THE COURT:** Mr. Robinson, as I understand these issues
13 have been raised before in terms of the *University of North*
14 *Carolina* case, the *Harvard* case. It was ruled upon as a matter
15 of law initially, was it not?

16 And then in terms of -- in fact, correct me if I'm wrong,
17 Ms. Hudson, my very able law clerk even has noted listening to
18 some of the oral argument, I believe Justice Jackson actually
19 raised this issue for the Supreme Court and nobody picked up on
20 it. It was not even mentioned anywhere in the exhaustive
21 opinions, Chief Justice Roberts' opinion. No one bought this
22 argument that you're raising.

23 Essentially, the argument you're presenting is the
24 position that Justice Jackson took and there was no support for
25 it from her colleagues. And it's really not referenced

1 anywhere in the various opinions. This is hardly new ground,
2 and I don't know why this matter is distinguishable from that
3 in terms of the record here in the *Harvard* and *UNC* cases from
4 the Supreme Court.

5 **MR. ROBINSON:** So we think it is distinguishable in
6 one of two ways, Your Honor.

7 The first is that my understanding of the readiness and
8 the ability issues that we are presenting that we're focusing
9 on here were not litigated in *Harvard* and *UNC* as directly as
10 they are here.

11 The focus, if you look at the District Court opinions in
12 those cases, was on whether SFFA was a genuine membership
13 organization. That's the issue that they focused discovery on.
14 That's the focus of the court's opinions.

15 Now, it's true that in motions to dismiss in both cases
16 the courts did say in passing defendants haven't contested
17 ability and readiness; but I look at their declarations and I
18 think the declarations are sufficient.

19 Here, we've had discovery on this issue, we have
20 deposition transcripts, and we think we've identified factual
21 disputes that require resolution at the trial stage.

22 The second distinguishing feature between this case and
23 *Harvard* and *UNC* of course is the way in which race was
24 considered.

25 So in *Harvard* and *UNC* they had an argument that race was

1 considered for everyone because you apply and you get a boost
2 where everyone is considered holistically.

3 Here, there are many ways in which it's not considered,
4 but I think the most salient way is there is an initial
5 academic qualification determination and no one gets considered
6 for selection until they are determined to be academically
7 qualified and that determination does not involve race. So, we
8 think that fundamentally distinguishes this case from *Harvard*
9 and *UNC*.

10 **THE COURT:** And you've noted in the papers where it's
11 taken into account -- what is it called -- the whole person
12 multiple, whatever it is, and that's at that factor where race
13 is considered, among other factors apparently.

14 **MR. ROBINSON:** It's actually not considered in the
15 calculation of the whole person multiple. That is a score that
16 depends on grades and SAT scores and some other factors. It
17 can be considered in ways that we will explain at trial. It's
18 actually not considered as part of the whole person multiple.

19 **THE COURT:** Okay. All right. Thank you very much,
20 Mr. Robinson.

21 With that, Mr. Norris, I'll be glad to hear back from you
22 on this.

23 **MR. NORRIS:** Just briefly, Your Honor. To clarify, in
24 *Harvard* and *UNC* standing was decided on motions to dismiss that
25 were filed after the completion of jurisdictional discovery.

1 Our Members *Harvard* and *UNC* were all deposed. Our president of
2 our association was deposed. There were documents exchanged on
3 standing. Basically the same posture as here, Your Honor,
4 there's no distinction between them.

5 There are always arguments in this case that race may not
6 be the reason someone was rejected, it may not be the reason
7 someone would be rejected in the future. Those have never
8 defeated standing. I didn't hear a response to *Parents*
9 *Involved*.

10 In terms of whether Your Honor should defer on ruling, we
11 defer to Your Honor's preference on that, but we do think we're
12 entitled to summary judgment, that courts in this circuit have
13 an affirmative duty to screen out defenses that are not
14 supported before trial in order to streamline the trial and
15 eliminate irrelevant issues.

16 And, of course, we're here now and we've briefed this
17 issue. The deposition -- the relevant parts of the depositions
18 are in front of Your Honor. There's not going to be
19 cross-examination of our Members at trial anyway. There are no
20 efficiencies to be gained, there are efficiencies to be lost by
21 not having a resolution of this issue after this argument.

22 **THE COURT:** Thank you very much, Mr. Norris.

23 **MR. NORRIS:** Thank you.

24 **THE COURT:** On this, I will followup with a memorandum
25 opinion on this specific topic. But, the Superior Court has

1 consistently emphasized that Article III of the Constitution
2 limits the jurisdiction of federal courts to cases in
3 controversies and to possess standing to sue under Article III
4 a plaintiff must, one, have suffered an injury in fact; and,
5 two, there must have been a causal connection between the
6 injury in fact and the conduct; and, three, the injury must
7 have been likely to be redressable by federal action. That
8 goes back to *Lujan*, a 1992 Supreme Court case.

9 Essentially, here, the Students for Fair Admission is an
10 organization and the standing here is based upon
11 representational or associational standing, that is the precise
12 issue here, and to invoke associational standing, which was
13 invoked in previous cases that went to the Supreme Court, an
14 organization must demonstrate that its members would otherwise
15 have standing in their own right, the interest it seeks to
16 protect are germane to the organization's purpose; and, three,
17 neither the claim asserted nor the relief requested requires
18 the participation of individual members in the lawsuit.

19 And really, here, it's very obvious that the only issue
20 before the Court is the matter of the first requirement of the
21 associational standing and that in terms of whether or not the
22 listed Members could sue on their own.

23 And I would just note that it's a given as well and
24 clearly been established was in the *Lujan* case and reiterated
25 in I think *Spokeo v. Robins*, 2016, that the -- as to

1 associational standing, SFFA has to at least have one of its
2 Members have suffered an injury in fact.

3 When I look at the submissions here, there really are no
4 genuine issues of material fact here. And there's no reason
5 for the Court to take the unusual step of having this not be
6 decided as a matter of law. It clearly can be decided as a
7 matter of law.

8 Emphasis has been placed on Members A and D by the
9 Plaintiff in response here with respect to in terms of their
10 Motion for Summary Judgment on this particular issue.

11 Member A, the record reflects is a [REDACTED] at [REDACTED]
12 [REDACTED] and participating in the Naval ROTC Program.
13 He's already in the ROTC Program. So any issue of being
14 medically disqualified is absolutely no issue of fact for this
15 Court to determine whatsoever.

16 There's no ambivalence about it, and I can't recall the
17 Academy would be taking the position that he might be medically
18 qualified for ROTC but not the Academy. That just flies in the
19 face of reason, and there's no issue of fact there.

20 He was found to be medically disqualified and the Academy
21 is taking a position that there was no consideration of race or
22 ethnicity in that medical determination.

23 Member B is a rising sophomore at the [REDACTED]
24 [REDACTED]. He was found to be academically not qualified, and did
25 not even complete a medical evaluation. Certainly he's

1 tenuous, at best; but I don't really need to worry about Member
2 B because the emphasis that the Plaintiffs have placed are on
3 Members A and D.

4 Member C is rising junior at [REDACTED].
5 And, again, he was found to be medically disqualified. But
6 Member D is applying and proffering that he is applying for the
7 class of 2029. He, as I understand it, is currently a [REDACTED]
8 [REDACTED] in the [REDACTED]. He's just starting
9 as a [REDACTED] at [REDACTED].

10 Again, all of these references will be under seal in terms
11 of the particular schools.

12 And he clearly could sue on his own, as could A; B and C
13 are questionable here.

14 In light of that and in light of the clear authority on
15 this case, just looking at the tracking of the *Harvard* and *UNC*
16 cases, and indeed reviewing some of the oral argument before
17 the Supreme Court, as far as I'm concerned it's pretty clear
18 that the Plaintiff's Motion for Partial Summary Judgment on
19 this issue should be granted, and we should move on as to that.

20 There really aren't any genuine issues of material fact
21 here. The membership association was founded in 2014 to
22 challenge the use of race and admissions and through the
23 instant litigation Students for Fair Admission has challenged
24 the Academy's race, what it contends are race-conscious
25 admissions practices.

1 Believe me, there's -- so the record is clear, there's no
2 way that this case is identical to *UNC* or *Harvard*. This entire
3 litigation is over Footnote 4 where the Chief Justice of the
4 United States, with the concurrence of the Members of the
5 Court, said that there are distinct features as to the military
6 Academy's, distinct from *Harvard* and *UNC*. So Annapolis and the
7 Naval Academy is not the same as *UNC* or *Harvard*.

8 When it comes to the matter of standing, I'm still guided
9 by the matter in which the issues were handled or not handled
10 with respect to standing here.

11 Under Rule 56, clearly summary judgment should be granted
12 if there's no genuine issue of dispute as to a material fact
13 and the movement is entitled Judgment as a Matter of Law.
14 There really is not a genuine issue of material fact when it
15 comes here as to Members A and D with respect to their ability
16 to sue on their own here.

17 Essentially, the Plaintiff has identified those four
18 Members who previously applied and were rejected. And we're
19 focusing upon Members A and D. They just have to show that
20 they're ready and able to apply, as has been noted in oral
21 argument.

22 And I'll issue an opinion before the day is over today on
23 this. And just so the record is clear, it will track through
24 *Grutter v. Bollinger* and *Fisher v. University of Texas*, and
25 even some of the reference to the oral argument that was

1 conducted in what I call the *Harvard* case.

2 And I've already mentioned that Justice Jackson
3 essentially raised the point that the Defendants raise here,
4 and that the Plaintiff could not show injury in fact, absent a
5 finding that these Members were harmed by the admissions
6 policy.

7 The simple fact of the matter is in an equal protection
8 case, such as this, the Supreme Court and the jurisprudence on
9 the standing issue is certainly more relaxed than the standard
10 the Defendants would encourage me to employ here. In the *Gratz*
11 opinion, which held that a rejected applicant be able and ready
12 to transfer has standing to seek prospective relief. There's
13 no requirement to prove that a person is going to do that.

14 I think the Students for Fair Admission have sufficiently
15 identified at least one member, probably I think two, who are
16 ready and able to reapply. It doesn't mean there couldn't -- I
17 don't need to base this upon Members B or C.

18 So, for those general reasons, having oral argument of
19 counsel and for the reasons just sort of briefly summarized
20 here, and I'll follow-up with a written opinion presumably by
21 the end of the day, or certainly first thing tomorrow, the
22 Plaintiffs' Motion for Partial Summary Judgment, which has been
23 under seal and any references to those colleges will be sealed
24 as well, on the issue of Article III standing the motion of the
25 Plaintiffs is granted, and a separate Memorandum Order will

1 follow on that.

2 Okay. Anything further on that before we get to the
3 Plaintiffs' Motion in Limine to Exclude Certain Testimony from
4 Captain Birch? Anything further?

5 Yes, Mr. Robinson, Mr. Norris, anything further on that?

6 **MR. ROBINSON:** No, Your Honor.

7 **MR. NORRIS:** No, Your Honor.

8 **THE COURT:** All right. The second issue I'd like to
9 address here this morning, if we can, is the second issue to
10 address here, the motion, is the Plaintiffs' Motion in Limine
11 to Exclude Certain Testimony from Captain Jason Birch who, as I
12 understand it, is presently a 3rd Battalion officer stationed
13 at the Academy; is that correct, Mr. Gardner? He's at the
14 Academy now?

15 **MR. GARDNER:** Yes, Your Honor.

16 **THE COURT:** And he will be a fact witness for the
17 Academy in November and previously -- and he's
18 African-American -- and previously, prior to his position at
19 the Academy, he at one point in time was a Navy SEAL officer, I
20 believe, correct?

21 **MR. GARDNER:** He's a Navy SEAL officer, Your Honor.

22 **THE COURT:** Yes. And Navy SEALs say once a SEAL
23 always a SEAL so I shouldn't use that in the past tense.

24 **MR. GARDNER:** I didn't want to correct you, Your
25 Honor, he's still a Navy SEAL.

1 **THE COURT:** Again, for the record, if I refer to any
2 Marine Corps officer in this litigation and say "was a Marine,"
3 I realize you don't do that. You may have been an Army officer
4 or Navy officer, but you're always a Marine and you're always a
5 SEAL. So if I slip up on that, my apologies to those who nobly
6 served.

7 So, with that, essentially, as I understand it the
8 Plaintiffs have essentially argued that his testimony regarding
9 his personal experience has minimal probative value; and,
10 essentially, that they also note his November 2020 article
11 in -- a magazine article essentially in terms of issues of
12 racial diversity in the military and the Navy. So they've
13 moved to exclude certain testimony from Captain Birch.

14 With that, I'll be glad to hear from Plaintiff's counsel.
15 Whoever is assigned to this. Mr. Connolly.

16 **MR. CONNOLLY:** Yes.

17 **THE COURT:** Thank you.

18 Be glad to hear from you. Good morning.

19 **MR. CONNOLLY:** Thank you, Your Honor. Your Honor is
20 already familiar with this issue so I'll be very brief. The
21 Plaintiff understands that Rule 403 is relaxed in a bench
22 trial. We filed this motion to exclude testimony only related
23 to those two incidents that Captain Birch discussed in his
24 article.

25 The purpose of our motion is in case the Court -- is that

1 the Court might believe that these incidents are so minimally
2 relevant to the issues in this case that the Court may want to
3 exclude that testimony from this trial.

4 **THE COURT:** If I'm not mistaken, Mr. Connolly, I dealt
5 with this preliminarily on a discovery issue, did I not?
6 Wasn't Captain Birch's deposition being taken and there was
7 some issue about specificity if I'm not mistaken?

8 **MR. CONNOLLY:** That is correct.

9 **THE COURT:** Just so the record is clear, I try to make
10 myself available on discovery disputes. I did that on that
11 occasion. I think we had a conference, and I essentially
12 denied your Motion to Compel certain responses from him. So,
13 in fairness to you, that's part of the record here, that you
14 were -- you initially sought more information from him but now,
15 essentially, the Motion in Limine is with respect to what
16 matters exactly. Exactly what are you seeking to exclude from
17 his testimony.

18 **MR. CONNOLLY:** That is correct, Your Honor. And our
19 motion is limited only to the two incidents that Captain Birch
20 described in his article. Both are decades old. I believe the
21 first one happened around 2000 when one of his superiors made
22 a -- made a comment to him, and the second was midway through
23 his career so probably around 2010.

24 **THE COURT:** Okay.

25 **MR. CONNOLLY:** And he discussed these two incidents in

1 his article. That, as Your Honor noted, that was part of the
2 issues in our discovery dispute. Your Honor declined to
3 issue -- have us have additional discovery on that. So to the
4 extent the Court believes that these incidents have minimal
5 relevance because they are isolated incidents, Captain Birch
6 repeatedly said these did not reflect the individuals that he's
7 dealt with in the Navy. They were rare. They were only a few
8 officers.

9 So to the extent that these are minimally relevant then
10 they should not be heard at trial.

11 And, with that, for this issue we're happy to stand on our
12 papers, or I'm also happy to answer any additional questions
13 you have.

14 **THE COURT:** As I understand it, just so we're clear,
15 first of all, just so the record is clear on this counsel, with
16 a bench trial the same rules apply to me. To the extent -- I'm
17 not much for waiver of appeal issues, which means that whatever
18 I denied in terms of discovery you have that as an appeal issue
19 ultimately in this case if you feel I unfairly limited
20 discovery in some fashion. That's why I followup by a letter
21 order on this so that's clear. And that's true throughout
22 you'll find even for the trial. To whatever extent, I try to
23 make sure the record is abundantly clear. People preserve
24 appeal issues, and then people waive issues with me when they
25 take appeals. I'm not worried about it.

1 So, in fairness to the Plaintiff, I limited some of the
2 deposition inquiry that you were making of Captain Birch and to
3 the extent that I did so you preserve that.

4 But, as I understand it, Captain Birch, who's now at the
5 Academy and is a SEAL officer, and he's being called as
6 essentially as a fact witness, is he not, Mr. Gardner?

7 **MR. GARDNER:** That's correct, Your Honor. He's being
8 called as a fact witness. And just for the record, my
9 colleague, Mr. Mendez, will be handling any response but I'm
10 happy to answer any questions about --

11 **THE COURT:** I'm sorry, who is handling this argument?

12 **MR. GARDNER:** Mr. Mendez, Your Honor.

13 **THE COURT:** Mr. Mendez, stand by. You're out there
14 far out on the flank, pardon my pun, but you're out there so
15 you'll be coming in.

16 (Laughter.)

17 **THE COURT:** In November of 2020, Captain Birch, who's
18 African-American, wrote an article in which he opined on the
19 importance of diversity in the United States Navy and then
20 recounted instances of bigoted insults over racism -- and
21 that's his words -- he experienced during his career. And in
22 that article there were two particular incidents to which he
23 made reference.

24 First, a senior SEAL captain asked Captain Birch and
25 another black SEAL candidate -- this is, again, this is what is

1 stated in the article -- quote, "how are my two little cookies
2 doing," end of quote.

3 And then a second instance referred to in the magazine
4 article was a senior enlisted SEAL team leader announced to
5 Captain Birch, quote, "I am a racist bastard, but I will always
6 support you," end of quote.

7 They're the two main matters as to which I did permit some
8 inquiry, and they're the two matters as to which you would seek
9 for that to be -- that testimony to be excluded, correct?

10 **MR. CONNOLLY:** That is correct.

11 **THE COURT:** Okay. That's what we're talking about
12 here. You don't think that should be in the record or should
13 be included. He should not be permitted to testify as to that.

14 **MR. CONNOLLY:** Correct. Just those two incidents.

15 **THE COURT:** Right. Again, so the record is clear,
16 during his deposition he had recounted other various instances,
17 but he refused to identify them with any great specificity.
18 And Students for Fair Admission moved to compel additional
19 testimony, and I denied that noting that chain of command
20 issues within the military and the need for confidentiality on
21 these matters.

22 Having said that, I did order that the Academy determine
23 whether the incident described in Captain Birch's deposition
24 testimony was memorialized in any records of any kind.

25 And in response to that, I believe I understand, that the

1 Academy submitted disciplinary records related to an incident
2 while Captain Birch was in Somalia but that didn't relate to
3 those two items; is that correct, Mr. Mendez? Is that right?

4 **MR. MENDEZ:** Yes, Your Honor.

5 **THE COURT:** Okay. And I'll hear from you in a minute
6 on this. And that had to do with racial caricatures or
7 whatever.

8 Are you seeking to -- is your Motion in Limine along with
9 those two items in the magazine article, are you seeking to bar
10 the evidence as to a black, enlisted member in Captain Birch's
11 command being the victim of racial caricatures in the incident
12 which I'll reference is in Somalia. Are you moving to exclude
13 that as well?

14 **MR. CONNOLLY:** No, Your Honor.

15 **THE COURT:** All right. I didn't think so but I'm just
16 trying to verify that.

17 Essentially, in terms of reviewing the submissions here by
18 the Students for Fair Admission, essentially, your argument is
19 that they're minimally relevant as just anecdotal evidences of
20 racism and that you cannot -- at trial you can't really
21 challenge these because there's no reference to the specific
22 individuals involved. Essentially, that's the thrust of your
23 argument?

24 **MR. CONNOLLY:** Yes, Your Honor.

25 **THE COURT:** That would really go to the -- to the

1 weight not the admissibility, wouldn't it? I mean, that's a
2 question just for me to weigh. I understand you can't
3 cross-examine each instance.

4 **MR. CONNOLLY:** Yes, Your Honor. We believe that that
5 is -- would be a question for you as far as weighing the
6 evidence. But, of course, under Rule 403 if the Court believes
7 these are so minimally relevant it has the option to
8 exclude testimony --

9 **THE COURT:** Well, it isn't if they're minimally
10 relevant, under 401 I determine if they're admissible, and the
11 fact it has probative value is more likely so than not, but
12 then after that hurdle then I address 403, in terms of even if
13 it's relevant and satisfies 401, whether or not it's unduly
14 prejudicial, essentially, or unfair in terms of that analysis.

15 I guess my question to you is, to give you an opportunity
16 to respond to this is that, essentially, there is Fourth
17 Circuit authority which strongly advises district judges here
18 in this circuit that when it comes to a bench trial it's not
19 too often that we exclude evidence under Rule 403 because it
20 was deemed to be prejudicial. It's not like we're barring it
21 from a jury that might be affected by it. I'm just giving you
22 an opportunity to respond on this in terms of clearly this kind
23 of issue is going to involve one's personal experiences in the
24 military.

25 And I just don't really understand what the basis for me

1 not to consider this and exclude it? You can certainly, I
2 mean, at trial you can certainly say this is an aberrational
3 event, perhaps on cross-examination. Captain Birch might say
4 those are the only three incidents he can recount in his entire
5 career, I don't know. But I'm just letting you know my
6 reservations to give you an opportunity to respond on that.

7 What would cause me to go against the winds of Fourth
8 Circuit jurisprudence that urged that in a bench trial Rule 403
9 is very seldom applied in these kinds of things?

10 MR. CONNOLLY: Sure. So in I believe it's the *Schultz*
11 opinion from the Fourth Circuit that Defendants identified.
12 And that case did not --

13 THE COURT: *Schultz v. Butler*, that's correct.

14 MR. CONNOLLY: Yes. That case did not go to whether
15 the Court has the power to exclude evidence because it would be
16 a waste of time. And so if is minimally relevant to the Court,
17 the Court can do it.

18 On the issue of unfair prejudice, again, we recognize that
19 Rule 403 is relaxed in the bench trial context for sure.

20 I think the only argument I would make is that *Schultz* did
21 not deal with what we have here, which is discussing incidents
22 in which in the deposition the names of certain discovery was
23 withheld from the other side.

24 And so, again, I recognize *Schultz* says that unfair
25 prejudice or unfair prejudice is, again, relaxed standard in a

1 bench trial. But that's how I would try to distinguish *Schultz*
2 there.

3 **THE COURT:** Thank you very much. With that,
4 Mr. Mendez, I'll be glad to hear from you. And I'll hear back
5 from you again in a minute, Mr. Connolly, and give you another
6 opportunity on this.

7 Mr. Mendez, good morning.

8 **MR. MENDEZ:** Good morning, Your Honor. May it please
9 the Court, Defendants respectfully request that this Court deny
10 Plaintiff's Motion in Limine seeking to exclude certain
11 testimony from Captain Jason Birch for three years. First, as
12 my friend on the other side just recognized, Third Circuit
13 precedent in this Court disfavors excluding evidence on unfair
14 prejudice grounds for cases that are proceeding before bench
15 trials. And that is sufficient to deny Plaintiff's motion.

16 Second, Captain Birch's testimony regarding his personal
17 experiences in the Navy over the course of his nearly
18 three-decades long career as a Navy SEAL officer is highly
19 relevant to the compelling National Security interest asserted
20 by Defendants in this matter.

21 Third, Plaintiff cannot establish unfair prejudice here.
22 Captain Birch testified on the record for more than four and a
23 half hours, and he was available to testify for up to the
24 seven-hour limit under the Federal Rules of Civil Procedure.
25 Captain Birch provided, throughout his deposition, specific

1 details regarding his experiences; and in addition to that,
2 Captain Birch was willing to describe specific conversations
3 that he had in response to Plaintiff counsel's questioning
4 using aliases.

5 In addition to that, Your Honor, in its motion, Plaintiff
6 seems to recycle many of the arguments that this Court rejected
7 last month in relation to its motion to compel additional
8 testimony from Captain Birch. Those arguments are no more
9 persuasive now than they were last month. I'm happy to take
10 any questions Your Honor may have.

11 **THE COURT:** No, I think that I recall when you all
12 contacted me, we had about an hour conversation on the record,
13 that this doesn't seem to be particularly unusual to me in
14 terms of testimony of a lay witness about personal experiences
15 and it's going to be interwoven throughout this trial it seems
16 to me. Thank you, Mr. Mendez, thank you very much.

17 And, with that, Mr. Connolly, I'll be glad to hear you if
18 you have anything further on this.

19 **MR. CONNOLLY:** Nothing further, Your Honor.

20 **THE COURT:** This motion will be denied. Again, I'll
21 follow up again, and it's important to follow up with a written
22 memorandum on this as well here that essentially these two
23 incidents, and just generally Captain Birch's testimony in
24 general, essentially, Students for Fair Admission's argument in
25 terms of excluding those two incidents, which refers to

1 anecdotal evidence or racism, are relevant here in terms of the
2 atmosphere that must be dealt with in the military in terms of
3 some contention. It's not minimally probative, it certainly
4 has probative value. Just as it has probative value if there's
5 been an improvement in race relations. There's a probative
6 value if people testify that there's no issue in terms of race
7 relations. This is going to be interwoven throughout this
8 trial on both sides. And we're just touching the edge of the
9 matter of strict scrutiny and minimally tailoring issues that
10 we're going to address obviously in this case and without
11 question at some point in time. This is the first time we'll
12 get into the waters that I know we're going to get to, pardon
13 my pun again on the use of waters, but the fact of the matter
14 is is that in terms of when does it end?

15 We're certainly going to hear argument in light of the
16 Supreme Court's jurisprudence of when does an end date occur
17 here. And throws out the question can there ever be an end
18 date when it comes to the military.

19 So all those -- we're just putting our feet slowly in the
20 water on these. There's no basis for me to exclude or grant
21 this motion in limine as to Captain Birch.

22 It is certainly has probative value and to the extent that
23 he has anecdotal evidence and testimony to offer about these
24 incidents. We don't have to have mini-trials on each one of
25 the issues, but that's his perception as to issues that he

1 faced. We don't need to have specific references to say names
2 and identities to these.

3 Counsel can certainly attack Captain Birch's credibility
4 in terms of how these incidents did or did not occur.

5 And so for the reasons that I've sort of generally
6 summarized here, his testimony on these topics is still
7 probative of the issue of the legitimacy of the Academy's
8 claimed compelling interest in National Security; and,
9 particularly, his experiences as an African-American naval
10 officer in terms of the need and effort for diversity and
11 whether or not that need survives strict scrutiny.

12 So for those reasons I've just generally summarized, and
13 for reasons that will follow in a memorandum opinion on that
14 question, Motion in Limine, Paper Number 87, will be denied.

15 So just for the record, we're granting here today
16 Plaintiff's Motion for Partial Summary Judgment, Paper Number
17 74; and I am denying Plaintiff's Motion in Limine, Paper Number
18 87 here.

19 Okay. The third matter to address here is the matter of
20 the Defendants' Motion in Limine regarding Plaintiff's expert
21 witnesses. And, specifically, this is a Defendants' motion
22 and, essentially, the thrust of that motion is that --
23 essentially, the Motion in Limine regarding the Plaintiff's
24 expert witnesses, the Defendants move to exclude testimony of
25 Brigadier General Christopher Walker and Lieutenant Colonel

1 Dakota Wood in their entirety as irrelevant and unhelpful in
2 light of judicial deference to military judgments where matters
3 of National Security are concerned.

4 And, secondarily, they move to essentially exclude a
5 portion of Mr. Richard Kahlenberg's expert testimony and
6 opinion concerning United States Coast Guard and any comparison
7 to the United States Naval Academy noting significant
8 differences between the two academies that preclude any
9 probative comparison.

10 With respect to Lieutenant Colonel Wood, Defendants
11 further argue that at minimum his testimony would be precluded
12 as a conduit for hearsay.

13 So, with that, I'll be glad to hear from defense counsel
14 on that. Who is addressing this issue. Mr. Carmichael?

15 **MR. CARMICHAEL:** Yes, Your Honor.

16 **THE COURT:** Nice to see you, and you may go to the
17 podium, and I'll be glad to hear from you.

18 Who is addressing the issue from the point of view of the
19 Plaintiff?

20 **MR. STRAWBRIDGE:** It's me, Your Honor.

21 **THE COURT:** Okay, Mr. Strawbridge, good. Thank you.
22 Mr. Carmichael, I'll be glad to hear from you.

23 **MR. CARMICHAEL:** Your Honor, I was going to address
24 the portion of our motion that deals with General Walker and
25 Wood and my colleague, Ms. Yang, was going to do

1 Mr. Kahlenberg.

2 THE COURT: Okay. That's fine.

3 MR. CARMICHAEL: Your Honor, the Court has previously
4 found that the principles of military deference apply in this
5 case.

6 THE COURT: And my Memorandum Opinion denied
7 preliminary injunctive relief.

8 MR. CARMICHAEL: Yes, Your Honor. So the question
9 comes, what does that mean? So it means different things for
10 different cases. For let's say a case where the places were
11 challenging the assignment of a SEAL team to Mogadishu, that
12 would be a non-judicable issue and that's how the deference
13 would be applied. And that's kind of the *Orloff*, *Eagan*, and
14 recently the *Austin v. SEALs* line of cases.

15 Here, it's a different line of cases. It's a policy
16 challenge. And there we sort of turn to the *Rostker*, *Goldman*,
17 *Hawaii* line of cases.

18 And those cases, they give some instruction on how to
19 handle these higher-up military policy type of cases. And they
20 say courts must be particularly careful not to substitute its
21 own valuation of evidence for reasonable valuation by the
22 military. And that's *Rostker* and *Hawaii*. And that --

23 THE COURT: There are two separate. *Rostker* is the
24 1981 opinion and *Hawaii* you're talking about *Trump v. Hawaii*
25 585 U.S. 667, right, the 2018 opinion?

1 **MR. CARMICHAEL:** Yes, Your Honor. Just reiterating
2 those same points from *Rostker*.

3 **THE COURT:** Just so the record is clear, *Rostker* and
4 *Hawaii* are two separate cases?

5 **MR. CARMICHAEL:** Yes, Your Honor. The Supreme Court
6 further instructed in *Goldman* that courts must give great
7 deference to the professional judgment concerning the relative
8 importance of a particular military interest. And that's
9 *Goldman v. Weinberg*, and that's the 1986 Supreme Court case.

10 And in those cases, the Court has criticized lower courts
11 for allowing a case of military judgment, reviewing military
12 judgment, to turn into a battle of the experts.

13 And in *Goldman* they said that the opinions of plaintiff's
14 experts on matters of good order and discipline and uniformity
15 were quite beside the point.

16 And in *Rostker* they said the Court exceeded its authority
17 for relying on those.

18 In *Winter*, they sort of dismissed all of the experts
19 except for the CNO, and said that the CNO is the one that gets
20 to say what training is.

21 I thought we had it in your motion, Justice Stevens put it
22 pretty well when he says because professionals in the military
23 attach great importance to the plausible interest -- and there
24 he's referring to good order, discipline, and uniformity --
25 it's one that we must recognize as legitimate and rational,

1 even though personal experience might persuade us that the
2 government has exaggerated the importance of the interest.

3 And here, that seems to be what the Plaintiffs with
4 General Walker and Wood are going to testify to. They're going
5 to put in their opinion that the military has exaggerated some
6 of its interest in diversity, its interest in unit cohesion,
7 military readiness, and operational risk management.

8 But those are things that typically the Supreme Court has
9 said it doesn't matter what the outside -- what outside experts
10 say on those -- those type of topics. And it's not just
11 because of what the Supreme Court has said, a lack of expertise
12 in that area, and that's what they say in *Gilligan*, but it's
13 also a separation of powers concern. That these armed force's
14 judgments, those particular types of judgments, are committed
15 to the executive and legislative branches, the ones that are
16 accountable to the electorate.

17 So that's sort of where the principle comes from.

18 So rather to invite this sort of battle of the experts on
19 these type of topics, our opinion is that they should just be
20 excluded from the beginning under the case law.

21 Plaintiffs did have a couple of counter-arguments that I
22 can address. First, they said that military deference doesn't
23 apply because it's a strict scrutiny.

24 I think there they are kind of conflating the standard of
25 review versus deference. *Goldman* and *Hawaii* were both cases

1 involving religion and that would be strict scrutiny. *Chapell*
2 *v. Wallace* is a case -- it ended up being a nonjudiciability
3 case, but that was a case where the service member was seeking
4 to make a *Bivens* complaint against their commanding officer for
5 race discrimination and the Supreme Court quoted the same cases
6 and said, no, you can't do that.

7 So military deference the Court found does apply.

8 And then they've cited to the *Rowe* case where the experts
9 came to talk about the current medical treatments and current
10 medical standards of HIV treatment. And that's an area that is
11 not kind of committed to the military by discretion. And it's
12 not committed to the military by our Constitution. So it was
13 allowed in that circumstance.

14 The military doesn't have a monopoly on knowledge for
15 treatment of HIV. They do sort of for good order and
16 discipline, for operational risk management, and unit cohesion
17 type issues. And that's why that case is different.

18 **THE COURT:** Does that military deference and exclusion
19 include considerations of race?

20 **MR. CARMICHAEL:** It would. It would. It does. It's
21 just how you apply it, right.

22 **THE COURT:** You're saying that in terms of certain
23 areas of expertise, I understand your analogy as to medical
24 care, that's not a particular military decision and there are
25 experts say on HIV that would testify. That was your point,

1 correct?

2 MR. CARMICHAEL: Yes, Your Honor.

3 THE COURT: Okay. All right. So my question to you
4 is that when it comes to matters of race, perception of race,
5 does that -- is that strictly an area that's just within
6 military decision making or not?

7 MR. CARMICHAEL: I think the fact that it's about unit
8 cohesion and that a diverse ship would -- diverse ship would
9 lower the operational risk of a ship that's going into combat,
10 I think that is something that you would defer to on.

11 THE COURT: I guess in terms of the matter of what's
12 down the road in this case in terms of competing testimony by
13 many distinguished military personnel here on both sides that
14 are going to testify apparently that really -- that's an area
15 in terms of my gatekeeper function under *Daubert*, essentially,
16 in terms of the methodology that's applied and the matter of
17 race considerations for cohesiveness. Essentially, that's what
18 we're going to be addressing in this case; is it not?

19 MR. CARMICHAEL: Yes, Your Honor. I mean, there's
20 other issues too I think that we claim --

21 THE COURT: I guess my point is is that to the extent
22 that General Walker is going to testify and opine, as I
23 understand it he graduated from the U.S. Air Force Academy and
24 served as an Air Force officer. And the matter of unit
25 cohesion in his view is -- that's not just strictly a military

1 judgment, is it?

2 **MR. CARMICHAEL:** I would think the unit cohesion would
3 be. I think that particularly is and his judgment that it may
4 not further operations in Kenya, I think that's a military
5 judgment.

6 **THE COURT:** That's for me, in terms of hearing the
7 testimony and filtering it out in terms of what I find
8 plausible and what I don't find plausible, correct?

9 I mean, my point is is that when it comes to this matter
10 of military officers expressing their viewpoints on it, and the
11 competing viewpoints, that ultimately is the task that's
12 assigned to me at a bench trial in terms of whether or not it
13 survives strict scrutiny or not and is sufficiently narrowly
14 tailored as well as how far it goes up the chain of command.
15 That's the point of seeking to exclude his testimony,
16 essentially, as being irrelevant and judicial deference should
17 be made to any military judgment.

18 I mean, that goes to the whole thrust of the case just as
19 it would be to the extent the Plaintiffs seek to exclude your
20 experts in this area.

21 I guess that's what I'm trying to focus upon.

22 I understand some of the implications of Lieutenant Wood,
23 I mean, Colonel Wood. In fairness to him, Lieutenant Colonel
24 is called a Colonel. I don't mean to belittle -- he's a
25 colonel.

1 And Colonel Wood, we have some other issues here in terms
2 of newspaper articles and secondary levels of hearsay, but my
3 fundamental question is when it comes to General Walker, in
4 terms of that particular question of race and cohesiveness and
5 his own impressions in terms of racial issues or lack thereof,
6 and his experience as a United States Air Force officer as to
7 that, that's really part of my gatekeeper function under
8 *Daubert*, is it not?

9 MR. CARMICHAEL: A lot of courts have handled it that
10 way where they hear the testimony and then exclude it at the
11 end.

12 THE COURT: I may not exclude it. I just may or may
13 not weigh in favor of the proponent of that expert. That's
14 all.

15 I'm in the middle of a jury trial earlier this week and
16 tomorrow where I instruct the jury that if someone is qualified
17 as an expert they're permitted to give an opinion but it's up
18 to the jury to accept and reject it. The same testimony
19 applies to me. It isn't a matter of excluding the testimony,
20 it's a matter of whether I accept it or reject it, correct?

21 MR. CARMICHAEL: With the caveat that Walker is not in
22 the military and neither is Colonel Wood.

23 THE COURT: Well, Walker is a retired general in the
24 United States Air Force so he was in the military.

25 MR. CARMICHAEL: He was. So it's also a separation of

1 powers concern. If this -- if they're back in as a civilian in
2 the military, that's a different question rather than somebody
3 that was -- that's not in opining --

4 **THE COURT:** You mean not in currently?

5 **MR. CARMICHAEL:** Not in currently.

6 **THE COURT:** I understand. Point well taken in terms
7 of where race relations is or it is not. That's exactly a
8 point well taken which is a topic we're going to be dealing
9 with at the trial. Thank you very much.

10 **MR. CARMICHAEL:** Could I go to the other --

11 **THE COURT:** Yes, I want you to come back. What I want
12 to do is I think we're finished with General Walker.

13 Let's get to the matter of Colonel Wood here because
14 Colonel Wood is a Naval Academy graduate and served in the U.S.
15 Marine Corps, and he apparently has opined that his view of
16 preferential treatment actually undermining authority, and the
17 considerations of race are not essential to military readiness.
18 He also has, essentially, has a series of interviews with
19 various career professionals that he summarized. On that, I'll
20 be glad to hear from you, not just in terms of the matter of
21 Colonel Wood, the same analysis of General Walker, but there's
22 a little bit more involved here. He has treatises or things to
23 which he's referring or is proffering and he's going to refer
24 to or summarize. So I'll be glad to hear from you on that.

25 **MR. CARMICHAEL:** Yes, Your Honor. I think there is --

1 we've already addressed many of the issues with General Walker.
2 Lieutenant Colonel Wood has a, you know, he's a little bit
3 further removed, 20 years out of the military. But the crux of
4 the difference is that he also appended several interviews that
5 he conducted with marine colonels, three marine colonels.

6 And we raise in our motion that he should not be allowed
7 to testify as to that hearsay of the opinions of these three
8 Marine colonels.

9 The Plaintiffs responded that they don't plan to offer him
10 as a conduit of hearsay, but they didn't specifically address
11 our complaint that he should not be relaying the opinions of
12 these three individual Marine colonels that we never got a
13 chance to cross-examine. That's an unfair advantage that he
14 gets to put on their opinions and we don't get to cross-examine
15 those individuals.

16 **THE COURT:** I understand. Thank you very much,
17 Mr. Carmichael.

18 With that, Mr. Strawbridge, I'll be glad to hear from you.

19 **MR. STRAWBRIDGE:** Thank you, Your Honor. A couple
20 points I want to make. We'll start with the bigger question
21 that was raised with both respect to Colonel Wood and General
22 Walker. And I think Your Honor, you know, understands our
23 arguments on this so I don't need to go on super long here.

24 But obviously we think that the fact that the military may
25 get some deference in some cases does not render testimony by

1 these experts irrelevant total for a few reasons. Not only is
2 this a bench trial where Your Honor obviously can hear the
3 testimony and decide what weight to give it at the end of the
4 trial, which we think is important for building a complete
5 record in this case, which I think Your Honor has recognized
6 and the Supreme Court has previously emphasized in like cases.

7 We also don't think that the military certainly doesn't
8 get the same level of deference on racial classifications.
9 We've cited the authority for that in our motion. Even if they
10 were to get some deference, and we can talk about what kind of
11 deference they might get, and what Mr. Carmichael was arguing
12 with respect to various military interests, but even if they
13 were to get some deference that does not give them a free pass
14 with respect to counter-arguments about the negative effects of
15 race, about narrow tailoring, and about whether or not the
16 Government's use of race can truly advance the interest that
17 it's asserting.

18 I just make the point here that neither General Walker nor
19 Colonel Wood are going to challenge for example the
20 Government's asserted interest writ large in lethality or unit
21 cohesion or even legitimacy. But there's still questions of
22 narrow tailoring, and they're entitled to provide testimony
23 based on their extensive experience about whether or not the
24 use of race is advancing those interests or whether it's having
25 negative effects. So that's the whole nature of the strict

1 scrutiny inquiry.

2 None of the cases that they rely upon involve strict
3 scrutiny to race. I don't need to remind anybody that there
4 are cases in the past in which the problem the Supreme Court
5 has recently recognized was we gave a little too much deference
6 to the military.

7 **THE COURT:** You cited, I think in your papers you all
8 cited the *Korematsu* in 1944.

9 **MR. STRAWBRIDGE:** Correct. And I don't mean to draw a
10 factual --

11 **THE COURT:** I made a little note, Mr. Strawbridge, in
12 late terminology, I have a little note to the side that says "a
13 bit too much."

14 **MR. STRAWBRIDGE:** Well, I think we go on to note in
15 our motion that we're not suggesting --

16 **THE COURT:** I'm glad. I really don't want to hear
17 about *Korematsu* in this litigation. I think that's really a
18 stretch. I think on your side of the aisle someone needs to
19 take a deep breath. And you can't compare *Korematsu* in 1944
20 with the readiness or lack of readiness of the U.S. Navy more
21 than the public was ever aware. And some unfortunate decisions
22 were made. I'm not justifying what was done. But I'm saying
23 to try to fit *Korematsu* into this kind of analysis in the 21st
24 century I think is a little bit of an unfair comparison. So I
25 don't expect to hear about *Korematsu* anymore.

1 **MR. STRAWBRIDGE:** We understand that point, Your
2 Honor. We do.

3 But in any event, we cited some of the cases, including
4 the HIV positive case in which the District Court in that case
5 did hear actual testimony in those cases.

6 We also note, the United States I think is -- or the
7 Government in this case is sort of coming and going in a few
8 ways because they rely heavily, including on the findings of
9 fact they submitted yesterday, on amicus briefs that were
10 submitted in prior cases from former military officials. They
11 even cite them at some point in the Motion in Limine. And I
12 thought their argument was that we can't listen to any
13 outsiders or who used to be in the military. I don't think
14 that's consistent. And I don't think it's consistent with the
15 application of strict scrutiny.

16 So unless you have other questions on that part of --

17 **THE COURT:** Well, no. I think, quite frankly, in
18 terms of General Walker, generally, and Colonel Wood,
19 generally, I do want to focus upon the Colonel Wood's testimony
20 in terms of discussing his interviews with certain
21 professionals, including I believe Colonel James Reilly,
22 Colonel Stephen Harris and Colonel Harold Van Opdorp. I'm not
23 sure if I'm pronouncing his last name correctly or not.

24 **MR. STRAWBRIDGE:** Sure.

25 **THE COURT:** But there are hearsay implications there

1 and I'd like to hear from you on those.

2 **MR. STRAWBRIDGE:** Sure. Obviously, the Court is
3 familiar that experts are entitled to rely upon hearsay. They
4 do so in a not infrequent basis. So there's nothing out of the
5 gate wrong with that to begin with.

6 I will emphasize that these parts of his opinion are not
7 particularly large or critical parts of his opinion. His
8 opinions largely come from his own experience in the military
9 and then as a defense policy analyst for a number of years.

10 He testified at the deposition that those interviews -- he
11 wanted to make sure that he wasn't missing anything. There's
12 nothing wrong with an expert interviewing other people and
13 soliciting additional opinions.

14 I'll know that the Government makes an issue about some
15 instructions not to answer. I just want to make sure Your
16 Honor is clear, those discussions arose from an agreement
17 between the party in the protective order. Both sides agree to
18 cut off inquiry into preliminary drafts and preliminary expert
19 reports. We raised that at the deposition. They did not come
20 back and restart that line of questioning or obviously take it
21 to the Court for motion to compel. But the suggestion that we
22 did anything improper with those instructions I just want to
23 put that to rest.

24 And at the end of the day I think that, well, the other
25 thing I'll say is that those interviews were included and

1 appended to his initial disclosure and at no point did they ask
2 to depose those people, did they seek to serve discovery upon
3 them. That seems like it was the appropriate time, if they
4 felt like they needed to question those people or pursue that,
5 they could have done so at that time. They had this report,
6 your know, for weeks, if not months, before the close of
7 discovery.

8 They chose not to cite that testimony, and I don't think
9 there's anything improper about him relying on that testimony.
10 But, again, this motion only goes to a small part of his report
11 anyway.

12 **THE COURT:** On that, I'll just note, Mr. Strawbridge,
13 it certainly seems to me that the matter of testimony by any
14 experts on either side is going to have some general discussion
15 as to interviews with other persons, impressions that people
16 had, decisions that were made, statistical analysis in terms of
17 minority leadership or lack thereof at certain stages and
18 careers. All of those things are going to be coming on both
19 sides of the aisle in this case, clearly. So to that extent, I
20 don't really see any basis with respect to in limine as to
21 General Walker, generally, or as to Colonel Wood, generally.

22 I will say in terms of his interviews with other
23 individuals and his citation as to those, I will -- I'm really
24 not particularly interested in hearing that. The deeper it
25 gets, the more it's being offered for the truth of the matter

1 asserted therein. It's a balancing act here on this. And it
2 goes well past mental impressions and actually being offered
3 for the truth. So to that extent, there may be some clipping
4 of this, to put it bluntly on that.

5 No disrespect to Colonels, Reilly, Davis, or Harold --
6 what is Colonel Van Opdorp, is that his name?

7 **MR. STRAWBRIDGE:** I believe that's correct.

8 **THE COURT:** Van Opdorp. It almost sounds like he's
9 only meant for the military.

10 Thank you very much on that.

11 Mr. Carmichael, before we move on to the matter of Richard
12 Kahlenberg and Ms. Yang, if you want to make any response here
13 on this as to Walker and to Wood I'll be glad to hear from you.

14 **MR. CARMICHAEL:** Nothing as to General Walker or
15 Lieutenant Colonel Wood.

16 **THE COURT:** But in terms of there are three references
17 to the -- those three officers, the thrust of your motion is
18 that they should either be excluded or just be taken in a
19 general context but not the specifics of what their opinions
20 are, essentially.

21 **MR. CARMICHAEL:** Yes, Your Honor.

22 **THE COURT:** It certainly seems to me in a bench trial
23 I'm able to do that without giving it too much of a haircut, I
24 guess, he can testify; but the Plaintiff is aware of the fact
25 that I'm not particularly interested in opinions of Colonel

1 Reilly, Colonel Davis, or Colonel Van Opdorp, if they're not
2 here to be examined in terms of the methodology under the
3 *Daubert* analysis, under the methodology and the applying of
4 that methodology. So that's how I see it.

5 **MR. CARMICHAEL:** Yes, Your Honor.

6 **THE COURT:** Thank you. All right.

7 With that, I think that -- included in this general motion
8 are also the matter of the portion of Richard Kahlenberg's
9 expert testimony in terms of comparing the United States Coast
10 Guard and the United States Naval Academy. And, with that,
11 Ms. Yang, I'll be glad to hear from you.

12 And who is handling this on the Plaintiff's side?

13 **MR. STRAWBRIDGE:** I will be, Your Honor.

14 **THE COURT:** All right.

15 Ms. Yang, I'll be glad to hear from you.

16 **MS. YANG:** Good morning, Your Honor.

17 **THE COURT:** Good morning still.

18 **MS. YANG:** So SFFA offers Mr. Kahlenberg to provide an
19 expert opinion that the Naval Academy could have drawn from the
20 Coast Guard Academy's race-neutral alternatives to achieve a
21 diverse class. Our contention that this portion of
22 Mr. Kahlenberg's testimony should be excluded because it's
23 speculative and not probative.

24 So I'll start today on the key areas where the parties
25 actually agree because I think those areas of agreement are

1 dispositive on these two matters.

2 So I'll start first with the 702(a) factor which is
3 whether the offered testimony will help the Court determine the
4 issues. And on this particular aspect, SFFA agrees that the
5 Coast Guard Academy does not have a congressional nomination
6 system and as a result they can admit anyone who applies to the
7 Academy. Whereas, by contrast, the Naval Academy very much
8 does have a congressional nomination system, and it's one in
9 which white applicants are disproportionately nominated by
10 Members of Congress.

11 And so another way of looking at this is no matter what
12 race-neutral alternatives the Naval Academy uses, let's say the
13 Naval Academy uses every single conceivable race-neutral
14 alternative under the sun, the effect of this congressional
15 nomination system means that if members of Congress are not
16 nominating minority applicants, then the Naval Academy's hands
17 are significantly tied for a huge proportion of its class. And
18 that's simply not an issue that the Coast Guard Academy needs
19 to contend with.

20 So that key difference and, again, Your Honor, it's a
21 difference between the two academies that both parties agree
22 fully on, that key difference means that any comparison between
23 the two academies is not probative.

24 Now, I took from SFFA's reply papers, you know, they say
25 their academies talk to each other therefore there's some

1 element of comparison, respectfully, Your Honor, that ignores
2 this critical difference with the congressional nomination
3 system that on the one hand very much constrains the Naval
4 Academy's ability to build a diverse class versus the Coast
5 Guard Academy's lack of constraint on the other hand.

6 The other argument that I expect my colleagues on the
7 other side to make is, effectively, it's a bench trial, let's
8 just let the evidence in and the Court can decide the weight
9 rather than admissibility.

10 On that point, Your Honor, I just make two responses: The
11 first is that the Federal Rule of Evidence 702 was recently
12 amended at the end of 2023, and what that amendment said was
13 basically that many courts had inappropriately applied Rule 702
14 and Rule 104, in particular, letting in expert testimony and
15 determining weight rather than admissibility.

16 And so the amendment emphasized that courts still need to
17 be applying this gatekeeping role, particularly when it comes
18 to expert testimony, and no less in a bench trial. So that's
19 the first response to that.

20 The second response is more practical 403 issue, which is
21 just that the trial schedule is already going to be quite tight
22 for both parties, and so this tangent about another Academy,
23 again, with a very different constraint and with a very
24 completely different admissions process is only going to waste
25 the parties' time exploring these various issues. So that's

1 the 702(a) factor.

2 And unless the Court has questions on that, I'll move on
3 to the reliability factors under the remainder of 702.

4 **THE COURT:** Sure.

5 **MS. YANG:** Really, again, here I'll start with the
6 areas of agreement because I think they are dispositive.

7 SFFA agrees that Mr. Kahlenberg does not have the puzzle
8 piece about the Coast Guard's specific efforts.

9 SFFA also agrees that Mr. Kahlenberg doesn't have the
10 puzzle piece about how the Coast Guard Academy's efforts
11 compare either in kind or in degree to the Naval Academy's
12 specific efforts.

13 SFFA also agrees that the only materials Mr. Kahlenberg
14 relies on are sources that were provided to him by Plaintiff's
15 counsel and that were checked against Google and that describe
16 the Coast Guard Academy's efforts at an extremely high level of
17 generality. And yet, with those limitations, what
18 Mr. Kahlenberg purports to do is to solve the puzzle and opine
19 that the Naval Academy should just do what the Coast Guard has
20 done. But, Your Honor, that it is a speculative opinion that
21 is not probative, is unreliable, and we cite to a lot of case
22 law in our papers establishing that conclusion.

23 So, again, on this issue as well with reliability I would
24 reiterate that the 2023 amendments to Rule 702 emphasize that
25 courts absolutely need to be applying the 702(b) through (d)

1 factors and excluding expert opinion that is not reliable that
2 does not meet those factors rather than letting it in and
3 simply determining weight.

4 So I'll stop there unless the Court has any other
5 questions, I'll be happy to address anything --

6 **THE COURT:** No, I do -- I would note that there
7 haven't been any surprises yet for me this morning, in terms of
8 the massive material that I've looked at, and my clerks have
9 looked at more; but one thing that does catch my attention,
10 Ms. Yang, is the white applicants are disproportionately
11 nominated in terms of the nomination process. And your point
12 is is that whereas the Coast Guard Academy cannot have any
13 racial consideration because they don't face that hurdle.
14 Essentially, you're saying the Academy faces a problem in that
15 regard in terms of a disproportionate nomination of white
16 applicants as opposed to minority applicants.

17 Is that essentially the thrust of your argument there?

18 **MS. YANG:** That's essentially, yeah, the Coast
19 Guard --

20 **THE COURT:** What is the statistical data on that in
21 terms of white disproportionate nominations I guess?

22 **MS. YANG:** I regret that I don't have the specific
23 number in mind.

24 **THE COURT:** But you're prepared to do that at trial is
25 what you're saying?

1 MS. YANG: Absolutely, Your Honor.

2 THE COURT: For example, hypothetically, in terms of
3 congressional nominations from Nebraska and North Dakota and
4 other places are not going to have a particular number of
5 minorities being nominated.

6 And I will tell you that this is the first time that I'll
7 throw out judicial notice, and this is more germane when we try
8 the case over nine or 10 days, is that there are more than a
9 few athletes at West Point and Annapolis and Colorado Springs
10 who have been nominated by a congressman from South Dakota, for
11 example. That's a well-known fact that in terms of this
12 nomination process -- it's been a known joke, I don't take it
13 as evidence necessarily. But the raw fact of the matter is is
14 that there are people that have been nominated for all of the
15 service academies by members of Congress who have not a clue
16 who congressman such-and-such is from Nebraska who nominated, a
17 particular defensive tackle from West Point or Annapolis.
18 That's just a raw fact. Either side can disprove that later if
19 you want.

20 I guess it strikes a nerve with me that you've raised this
21 point that the overall pool of applicants is affected by the
22 number of white applicants being disproportionately nominated.
23 That's a fact that you've thrown out. I'm not making a finding
24 one way or the other.

25 MS. YANG: I understand.

1 **THE COURT:** That is something that you're proffering
2 the Academy is prepared to prove when the time comes.

3 **MS. YANG:** That's right. And it's something that
4 really constrains the Naval Academy's ability to build a
5 diverse class --

6 **THE COURT:** I understand.

7 **MS. YANG:** -- in the way that simply is not the case
8 for the Coast Guard Academy.

9 **THE COURT:** All right. Thank you very much.

10 **MS. YANG:** Thank you.

11 **THE COURT:** Mr. Strawbridge, I'll hear from you. You
12 don't need to chase down that rabbit hole too much,
13 Mr. Strawbridge, now on the matter of white applicants being
14 disproportionately nominated. I understand that.

15 I guess my real question is in terms of the gatekeeper
16 function and Mr. Kahlenberg's opining here in terms of,
17 essentially, the no consideration of race by the Coast Guard
18 Academy. What is the basis of his opinion? What was his
19 methodology on this? Has he ever been on the campus of the
20 Coast Guard Academy, to start, has he ever been there?

21 **MR. STRAWBRIDGE:** I do not believe he visited campus
22 of the Coast Guard Academy but he has --

23 **THE COURT:** Does he have military background?

24 **MR. STRAWBRIDGE:** Mr. Kahlenberg does not have
25 military background.

1 **THE COURT:** So how did he come to opine the similarity
2 between the Coast Guard Academy and the Naval Academy?

3 **MR. STRAWBRIDGE:** Well, Mr. Kahlenberg is preeminent
4 scholar on alternatives to the use of race in college
5 admissions. He's written dozens of books and articles --

6 **THE COURT:** That's fine. He's the authority on
7 college admissions.

8 **MR. STRAWBRIDGE:** Correct.

9 **THE COURT:** This is very clear, if there's anything
10 that's clear, in Footnote 4, which we'll be talking about for
11 at least 200 more times as we go through this litigation and
12 Chief Roberts' opinion and what I'll call the *Harvard* and *UNC*
13 cases, this is not a straight analysis of just an academic
14 institution. And I want to make sure that's my view of it, and
15 if you think I'm wrong then be ready to deal with it because
16 the U.S. Naval Academy is not just any other college.

17 So you've got a steep mountain to climb if you think we
18 take a cookie cutter and say the Naval Academy is like the
19 other academic institutions, it is not.

20 **MR. STRAWBRIDGE:** Well, I think that's precisely why
21 this Coast Guard testimony is relevant.

22 **THE COURT:** Okay.

23 **MR. STRAWBRIDGE:** And the reason why is because I
24 expect the U.S. Naval Academy is going to make all of the
25 points you just made, which are fair points, there are

1 different constraints. Although there are some things that are
2 similar with respect to them being a lead institution and
3 having --

4 **THE COURT:** Absolutely. I'm not disputing that.
5 That's why I asked Ms. Yang the follow up about what she's
6 projecting at trial.

7 Clearly, the nominations requirement, be it statutory or
8 otherwise, and superintendent's nominations, and selecting
9 midshipmen from the fleet, all of those factors are totally
10 different than applicants to any college. And I'm sure you
11 recognize that.

12 But my point is that in terms of the strict scrutiny and
13 narrowly tailoring something, I understand why Mr. Kahlenberg
14 is being offered, but it has to be a fair comparison. That's
15 the point. And, apparently, the Coast Guard Academy is on the
16 terrain, as most other colleges are, people just apply and they
17 have a pool of candidates and they look at. There's no
18 limitation about who's in the pool, whereas clearly there is
19 for the service academies, be it Annapolis or West Point or
20 Colorado Springs it seems to me.

21 **MR. STRAWBRIDGE:** So I agree that there are
22 differences, and I'm not denying that and Mr. Kahlenberg will
23 not deny that. He obviously takes that into account.

24 With respect to his methodology, he reviewed some
25 extensive public records that are available, including

1 congressional testimony, including news coverage. And
2 obviously, this is a key point, the fact that the Coast Guard
3 Academy has been invoked by the United States in some of the
4 prior cases, like *Grutter* and the brief it filed in the *Harvard*
5 case.

6 So I don't think it's off base to say that they're so
7 completely different that they can't tell us anything.

8 What weight Your Honor decides to give that after he hears
9 the testimony is obviously open to your decision. That's part
10 of your process. But they're minimally -- they meet the burden
11 for at least minimal relevance and consideration. Because, as
12 you said, although there are differences between the Naval
13 Academy and other colleges, and the congressional nomination is
14 an acknowledged difference, they also have to meet the medical
15 requirements, they have to meet physical fitness requirements,
16 they certainly draw upon the same types of pools of candidates,
17 limited pools of candidates. This is all available on the
18 public record and could be found.

19 I would not, and we understand Your Honor's point in the
20 Coast Guard -- the prior litigation we had over the Coast Guard
21 subpoena, but at that time the lawyers who represent the
22 Academy in this case argued that there was no need for those
23 documents from the Coast Guard Academy, in part because we
24 could use what was available in the public record to make our
25 point on this.

1 **THE COURT:** Just so the record is clear, this also is
2 another discovery matter that came up in which I ruled against
3 your client --

4 **MR. STRAWBRIDGE:** Correct.

5 **THE COURT:** -- with respect to seeking documents from
6 the U.S. Coast Guard Academy, and I think that was going far
7 afield. I think you correctly do note that the contention was
8 we don't need the records, you can still make -- the evidence
9 can be presented as to how the Coast Guard Academy handles
10 applications.

11 **MR. STRAWBRIDGE:** Correct. And in our opposition
12 brief we did identify a number of documents that we discovered
13 in this case about summits that are had between the admissions
14 office or admission teams at the Coast Guard Academy and the
15 other service academies. Presentations that they had about how
16 to use race in admissions if the SFFA decision came out the
17 wrong way. I mean, that to me suggests that the Coast Guard is
18 not so far afield and so irrelevant.

19 And my last point on this is we're still dealing with
20 strict scrutiny, and part of the strict scrutiny analysis in
21 this line of cases is the burden is on the Academy in this case
22 to demonstrate that it has considered race-neutral
23 alternatives. And there is relevance to the fact that it has
24 not asked the Coast Guard or it has not looked into that. You
25 may not decide that's super relevant, but it certainly bears on

1 that inquiry under strict scrutiny.

2 **THE COURT:** I understand that. Thank you very much,
3 Mr. Strawbridge.

4 Ms. Yang, I'll be glad to hear from you on this.

5 **MS. YANG:** Thank you, Your Honor. I'll make three
6 very brief responses. The first is that Mr. Kahlenberg
7 obviously offers many other opinions about other race-neutral
8 alternatives. We haven't moved to exclude any of those. So
9 our motion is really just limited to this Coast Guard piece
10 because it's not relevant and because it's not reliable. So
11 that's the first point.

12 The second goes to the subpoena issue that my friend just
13 raised. And, really, the point that we made about the lack of
14 need in response to the subpoena was that clearly SFFA thought
15 they had enough materials to offer an expert opinion about the
16 Coast Guard because at that point they had already offered that
17 expert opinion.

18 The point that we're making now, now that we're at the
19 motion in limine stage, is that that opinion, based on four
20 sources that are not particularly informative, and based on
21 Mr. Kahlenberg's lack of particular expertise or knowledge
22 about the Coast Guard Academy, is that that particular piece of
23 his opinion is not relevant or reliable.

24 And finally, Your Honor, my last point is just to
25 reiterate that of course we recognize that this is a bench

1 trial, but of course the Rules Advisory Committee in the 2023
2 amendment emphasized that all courts need to be applying the
3 702 factors, that it's not appropriate simply to just let all
4 expert testimony in and give it its due weight; but rather when
5 there are admissibility concerns that it is proper and
6 necessary for the courts to be excluding that at the outset.

7 **THE COURT:** Thank you very much, Ms. Yang.

8 **MS. YANG:** Thank you.

9 **THE COURT:** On this, essentially, and I will follow up
10 with an opinion on this as well, with respect to General
11 Walker, as far as General Walker is concerned, the motion to
12 exclude his testimony is denied. He's clearly entitled to
13 testify in my view and its assistance to the Court in that
14 regard and he has expertise and satisfies even the modified and
15 amended Rule 702(a) factors, as is Colonel Wood.

16 He's not permitted to just summarize the views of those
17 three colonels to whom I made reference a few minutes ago with
18 respect to his view and so they'll be limited to that extent.

19 With respect to Kahlenberg, Mr. Kahlenberg, I would
20 note -- the three individuals, Colonel Reilly, Colonel Davis
21 and Colonel Van Opdorp. Colonel Wood made reference to general
22 discussion with them and others, but I'm not going to permit
23 their detailed summaries. That won't come in.

24 With respect to Richard Kahlenberg, I'm satisfied even
25 with the 702(a) procedures that we don't need any further

1 inquiry Coast Guard Academy, but he certainly can opine as to
2 the extent to which how the Naval Academy deals with its pool
3 of applicants, however it is created, even including a
4 nomination process, how that compares to how the Coast Guard
5 Academy deals with its pool of applicants which does not
6 include the nomination process. But I find it would be helpful
7 in terms of the strict scrutiny analysis that has to be
8 applied, and I'm going to permit Mr. Kahlenberg to testify in
9 that regard.

10 And with respect to that we will follow up also with an
11 opinion pretty quickly on this as well.

12 So here we go on that, Elizabeth.

13 So the next item here -- Ronda, how you doing? Do you
14 need a break?

15 **THE COURT REPORTER:** A break would be good.

16 **THE COURT:** We'll take about a 10 or 15-minute break
17 and we'll pick up again. My plan is I think we can finish by
18 lunch. If not, we can go to lunch and come back after lunch.
19 I've pretty much set aside the whole day for this. So we'll
20 take a 10-minute break.

21 **(There was a break at 11:52 a.m. to 12:10 p.m.)**

22 **THE COURT:** All right, Counsel. We're now on the
23 fourth matter here. The Defendants' Motion in Limine
24 concerning certain exhibits, Paper Number 86 here. And,
25 essentially, this relates to the Students for Fair Admission

1 proposed exhibit list and the Academy is seeking to exclude
2 certain expert reports as admissibility hearsay and as well as
3 declarations from trial witnesses. And it relates specifically
4 to a declaration from General Thomas Spoehr, which I think we
5 addressed in our previous preliminary injunction motion.

6 So, with that, who is arguing this on behalf of the
7 Defendant here. Mr. Gardner, you are arguing this?

8 **MR. GARDNER:** I am, Your Honor.

9 **THE COURT:** That's fine. I saved this till last
10 because we've got a list of exhibits, and we need to sort of go
11 down the list and see exactly what we're talking about and not
12 talking about.

13 Who is addressing this on the Plaintiff's side,
14 Mr. Strawbridge?

15 **MR. STRAWBRIDGE:** I am, Your Honor.

16 **THE COURT:** You've got the two lead guys in the middle
17 by the podium.

18 **MR. GARDNER:** I would like to say we planned that,
19 Your Honor, but I don't think we did.

20 **THE COURT:** That's fine. That's fine. So, with that,
21 you've also noted that the exhibit list has included the
22 declarations that the Academy submitted for five witnesses who
23 will testify live at trial and there's also news articles,
24 reports, books, and websites that have been listed. So I need
25 to get my handle on what we're talking about and what you're

1 seeking to exclude. Approach it whatever way you want. Maybe
2 we can go down the list. I'm not sure.

3 **MR. GARDNER:** That's fine, Your Honor. I also
4 recognize that I'm the impediment between us and lunch so I'll
5 try to be efficient.

6 **THE COURT:** No, no, there's no rush. I made a point
7 of this jury trial that I've been in this week that I was not
8 going to change the schedule here so we have all day. So we
9 can go up to a certain point and come back and break for lunch,
10 so that's fine.

11 **MR. GARDNER:** Thank you, Your Honor. So the
12 Government, as you noted, has moved to exclude four categories
13 of exhibits reflected on Plaintiff's exhibit list. And just by
14 way of background, the impetus for the Government's motion were
15 comments that were made during the last discovery dispute
16 hearing regarding Captain Birch and the Coast Guard where we
17 understood the Court wanted to front-load any evidentiary
18 issues pretrial --

19 **THE COURT:** Yes.

20 **MR. GARDNER:** -- to streamline the trial. So I just
21 wanted to be clear we're not here to obviously waste the
22 Court's time.

23 **THE COURT:** No, no.

24 **MR. GARDNER:** But we thought this was a sufficient
25 methodology for approaching some categorical objections we had.

1 **THE COURT:** A bench trial is a little different in
2 terms of certain evidentiary issues that come up.

3 **MR. GARDNER:** That's right.

4 **THE COURT:** I do prefer to try to get through these.
5 It gives more time for actual witness testimony, and I'm hoping
6 we coordinate in terms of the number of witnesses here so go
7 ahead.

8 **MR. GARDNER:** That was our philosophy as well. As I
9 understand SFFA's basic response to our objections is that
10 they're premature and the Court should just wait to resolve any
11 objections to exhibits until SFFA actually seeks to admit them
12 with a witness at trial. We obviously defer to the Court in
13 terms of how it wants to approach these sorts of issues.

14 But, I will note that given SFFA's opposition, it could be
15 useful to at a minimum get some general guidance from the Court
16 as to how Your Honor, you know, wants to approach some of these
17 evidentiary issues, such as hearsay and cumulativeness.

18 I think what makes the most sense, Your Honor, is start
19 categorically and talk about the expert reports.

20 **THE COURT:** Yes.

21 **MR. GARDNER:** As we noted in our motion, and
22 Plaintiffs don't seriously contest this, in this circuit courts
23 have held expert reports are hearsay. Plaintiffs, as I
24 understand, have three responses to that.

25 The first is that the parties may need to refer to the

1 reports if issues of nondisclosure come up, but claims about
2 nondisclosure do not require the reports to be admitted into
3 evidence. In fact, it doesn't even require the reports to be
4 identified on the exhibit list. So that rational doesn't
5 really seem to justify admissibility.

6 Second, SFFA claims that portions of the report may be
7 used with experts such as for consistent or inconsistent
8 statements under Rules 801(d), 806, and 613. And I can take
9 each of those in turn.

10 **THE COURT:** So we're clear, reports, with respect to
11 expert reports, I don't know that they're necessarily not
12 admissible. I think an accurate statement is they're not
13 admissible without the preparer being present in court to
14 testify as to qualifications as an expert and to be
15 cross-examined. And then the reports come in if the witness is
16 on the witness stand.

17 **MR. GARDNER:** Respectfully, Your Honor, I don't
18 understand there to be an on-the-stand exception to the hearsay
19 rule. And courts in the Fourth Circuit have recognized that
20 these are out-of-court statements and offered for the truth of
21 the matter asserted.

22 I will be the first to acknowledge, Your Honor, there are
23 courts in bench trials who will allow expert reports in, either
24 to accompany the record because the court finds it to be of
25 assistance to the trier of fact. I'm also aware that in bench

1 trials there are other courts who take a harder line and say
2 they are hearsay. Obviously, we will defer to --

3 **THE COURT:** I'm trying to guide you through this
4 discussion, and I'm not trying to interrupt you, my point is
5 with respect to an expert who testifies and is here in court
6 and subject to cross-examination, as to those reports,
7 generally, my policy has been they may or may not be
8 admissible. Many times there's a secondary level of hearsay
9 under Rule 805 --

10 **MR. GARDNER:** Exactly.

11 **THE COURT:** -- as to which I'm conscious and I have
12 portions stricken. But my view is, to summarily say that all
13 reports are hearsay, they're not admissible, I don't think
14 that's quite -- it's a little bit of a broadbrush summary, in
15 all candor.

16 I think, clearly, to introduce expert reports and the
17 preparer is not here, it's hearsay. To the extent that they
18 testify and subject to cross-examination, they're always marked
19 for identification at least, and they may or may not come in.
20 But my practice has always been to be very much aware of the
21 secondary level of hearsay within a report.

22 **MR. GARDNER:** And, again, we completely defer to Your
23 Honor's preference --

24 **THE COURT:** If you believe there is a secondary level
25 of hearsay then alert me to it in case --

1 MR. GARDNER: Yes.

2 THE COURT: -- it slides through. That's the point.

3 MR. GARDNER: Sorry, I did not mean to speak over you.

4 THE COURT: No --

5 MR. GARDNER: We had made in our motion that secondary
6 805 argument that these are hearsay within hearsay. But
7 there's also a practical issue that I just want to flag for
8 Your Honor, and I understand your views about this issue.

9 Given how many witnesses there are in this case, and I'm
10 sure we'll talk about that when we talk about the pretrial
11 order, and given the time we have, I do have a practical
12 concern about expert reports coming into evidence, and the
13 reason is this: In my experience in bench trials, one of two
14 things can happen when expert reports come into evidence. If
15 the witness does not testify, the expert doesn't testify to the
16 entire breadth of the expert opinions, but the expert report
17 comes into evidence, we would be precluded by going beyond the
18 scope of direct in terms of asking questions. Alternatively,
19 if the Court's attitude is we can go beyond the scope of direct
20 because the expert report is in evidence, that incentivizes the
21 propounding attorney to limit the scope of oral testimony and
22 let the other side burn through time asking questions about
23 unexplored topics in their oral testimony.

24 So, I just wanted to flag that particular concern,
25 understanding this Court's attitude about expert reports.

1 Again, if the Court would prefer to take this up as they come
2 in, that's fine. We just wanted to flag that conceptual issue
3 for this Court now.

4 **THE COURT:** Okay. As I understand it, in terms of the
5 Motion in Limine and the topics, with respect to a series of
6 proposed exhibits, for example, certain expert reports under
7 Rule 26(a)(2) you've sought them to be excluded, expert reports
8 may come in with live testimony.

9 I think the simple answer to it is I'm assuming that every
10 expert on either side of the aisle who comes forward is going
11 to have a report of some sort. Is that a fair presumption,
12 Mr. Strawbridge, from your point of view? Are you going to
13 have any experts who don't have a report? I doubt it.

14 **MR. STRAWBRIDGE:** No.

15 **THE COURT:** Mr. Gardner, are you going to have any
16 experts who do not have a report?

17 **MR. GARDNER:** Our experts either have reports or
18 disclosures under 26(a)(2)(C) because they're not specially
19 retained. And, we have not argued that the 26(a)(2)(C)'s are
20 hearsay; there, the argument is they're simply cumulative of
21 the testimony they're going to provide on the stand.

22 **THE COURT:** On this it seems to me there's no way I
23 can rule upon this now other than to say that's how we're going
24 to approach it. There may be -- I can envision on either side
25 of the aisle on this, maybe someone is qualified as an expert

1 with respect to, hypothetically, combat readiness and either
2 side will have someone opine as to that in terms of perhaps
3 racial diversity issues. I'm not suggesting that that has to
4 be in a report nor that it necessarily will be. But as to
5 that, a person may be qualified on either side. And I'll be
6 glad to hear what they have to say.

7 But in terms of the reports, generally, the reports don't
8 come in. But they're not automatically barred. I anticipate
9 that they'll have a report and it'll be marked for
10 identification, and if we scrub that with any hearsay issues,
11 it may or may not come in with testimony, and there may not be
12 any objections on either side. There's a little bit more of a
13 flexibility on that, but I really can't rule in advance on it.

14 **MR. GARDNER:** Totally fair, Your Honor.

15 **THE COURT:** I just wanted to -- I created a list of
16 this. It's why I did this last because I thought this would
17 take awhile before we get to the pretrial order. We may have
18 to break for lunch and come back.

19 **MR. GARDNER:** Yep.

20 **THE COURT:** There is a declaration from General
21 Spoehr.

22 **MR. GARDNER:** That's right.

23 **THE COURT:** On which the Plaintiff relied in its
24 preliminary injunction motion, and you've moved to totally
25 exclude that. I'll be glad to hear from you on that.

1 **MR. GARDNER:** That's Exhibit P281. That's exactly
2 right.

3 **THE COURT:** That's right.

4 **MR. GARDNER:** As we noted in our motion, that
5 declaration is hearsay. It is clearly being offered for the
6 truth of the matter asserted. As we also note, SFFA never
7 identified Lieutenant General Spoehr in its initial disclosures
8 or provided an expert report from him. We have not had the
9 opportunity to depose him, and we will not have the opportunity
10 to cross-examine him. He is not coming to trial.

11 In a footnote in SFFA's response, it disclaims that it is
12 offering that exhibit as expert testimony. But if you were to
13 look at that exhibit, which is in the record because it was
14 submitted in connection with the preliminary injunction, it's
15 clear that Lieutenant General Spoehr is offering expert
16 testimony, not fact testimony.

17 For example, if you look at Paragraph 2 of his
18 declaration, he notes that he was retained by SFFA and that
19 he's being paid \$400 for his work. That's not the province of
20 personal knowledge.

21 **THE COURT:** \$400 in total or \$400 an hour?

22 **MR. GARDNER:** He said \$400 for his work. I don't know
23 what that means. I'm sure Mr. Strawbridge can explain further.

24 Just to be clear, in Paragraph 3 of his declaration he
25 says his statements are based on his personal knowledge,

1 military judgment, experience, and the knowledge and
2 information he obtained during his military career and his past
3 seven years as a defense policy expert.

4 He then goes on to state that in reaching these opinions,
5 again, opinions, I have reviewed and relied upon the documents
6 referenced therein as well as the papers both parties have
7 submitted in this action.

8 Your Honor, that's classic 702 opinion testimony.

9 **THE COURT:** I think it might be helpful to go seriatim
10 on these. Thank you, Mr. Gardner.

11 Mr. Strawbridge, what is it you intend to do with respect
12 to this particular exhibit here, a declaration from General
13 Spoehr?

14 **MR. STRAWBRIDGE:** Yes, as we said in Footnote 3 on
15 Page 5 of our opposition, we do not intend to offer Lieutenant
16 General Spoehr as an expert at trial. That was not our
17 intention in marking this for identification as an exhibit.

18 Just so the Court, and everybody knows, Lieutenant General
19 Spoehr between the time of the preliminary injunction and the
20 merits phase of this case is being considered for a federal
21 position and that necessitated that he would not be available
22 to testify at the trial. And there's nothing unusual about
23 that.

24 **THE COURT:** Well, there's no basis for his declaration
25 to come into evidence.

1 **MR. STRAWBRIDGE:** Yeah, I mean, theoretically some of
2 their experts may have considered it or they may make
3 statements about never seeing anyone ever express an opinion.
4 Is there a possibility we might use at trial, it seems very
5 remote to me, but that's the only reason it's there, and I
6 would be very surprised.

7 **THE COURT:** Just so it's clear, that will not be
8 introduced into evidence. Period. If he's not going to be
9 here, his summary report is not going to be there.

10 **MR. STRAWBRIDGE:** And we don't have a problem with
11 that.

12 **THE COURT:** To that extent, the motion is granted as
13 to -- are you with me on this, Anna? Good chart on this, by
14 the way.

15 The declaration from the parties' expert reports and Rule
16 26(a)(2)(C) disclosures, we'll deal with it as we go through
17 trial. And as to Plaintiff's Exhibit 281, the Motion in Limine
18 is granted. It'll be excluded, so.

19 **MR. STRAWBRIDGE:** Just so I understand, Your Honor, if
20 we believe during the course of trial for some reason there's
21 an ability to use it as cross or offer it for a limited
22 purpose, is that off the table?

23 **THE COURT:** We'll have to wait and see. I tend to
24 doubt it. You can cross exam but only if they refer to it, but
25 I wouldn't bet the farm it's going to come into evidence, quite

1 frankly.

2 **MR. STRAWBRIDGE:** Neither would I, Your Honor.

3 **THE COURT:** All right. That's fine.

4 So, with that, Mr. Gardner, let's go -- the next one will
5 be the declaration of Bruce Latta. And he's a named Defendant
6 in this case, right?

7 **MR. GARDNER:** There's a very simple, basic argument
8 for all of these declarations.

9 **THE COURT:** Let's go step-by-step.

10 **MR. GARDNER:** Well, it's the same position for all of
11 them so I'm trying to be more efficient.

12 **THE COURT:** John Fuller, Vazirani, John Sherwood.

13 **MR. GARDNER:** Right. All of these people are
14 testifying live so the only argument here is a 403 cumulative
15 argument. What is the point of putting in their declarations
16 if they're going to be subject to cross-examination while on
17 the stand. If the Court wishes them to come in --

18 **THE COURT:** No, no, I have no problem. The Plaintiff
19 is permitted to do that, as far as I'm concerned. To the
20 extent that there's any listed witness here and there's a prior
21 declaration, that is an appropriate plaintiff's exhibit that
22 they will utilize to cross-examine that person.

23 And so there's no basis to grant a motion in limine as to
24 that. To the extent that they're just going to seek to
25 introduce declarations of people who are not testifying, that's

1 another matter.

2 But to the extent that they're testifying those -- those
3 declarations, including I think there's one exhibit that
4 actually corrects Dean Latta's declaration, I think.

5 **MR. GARDNER:** It's a notice that the attorneys filed
6 on the docket. It's not a declaration or anything like that.

7 **THE COURT:** All right, whatever. My point is that
8 just in terms of the declaration of Bruce Latta and any
9 revision, the declaration of John Fuller, the declaration of
10 Ashish Vazirani -- that's V-A-Z-I-R-A-N-I, Ronda -- the
11 declaration of John Sherwood, declaration of Jason Lyall, along
12 with his curriculum vitae and works cited, all of those
13 exhibits are appropriately noted and can be utilized and
14 introduced into evidence by the Plaintiff in terms of examining
15 those witnesses. And for that matter, as I think you all know,
16 there's great liberality in terms of who you're going to call
17 as witnesses, quite frankly.

18 **MR. GARDNER:** Sure. And the only other thing I'll
19 clarify for Your Honor, just in light of the last conversation
20 we had about expert reports is Dr. Sherwood and Dr. Lyall are
21 expert witnesses. Again, I'm not sure that changes anything in
22 this case but I just wanted to flag that for you in light of
23 your discussion we just had about --

24 **THE COURT:** It doesn't change anything in terms of
25 basic analysis.

1 **MR. GARDNER:** Right.

2 **THE COURT:** I see no basis to exclude those and so the
3 motion would be denied as to those. They're certainly free to
4 use those.

5 **MR. GARDNER:** That's fine, Your Honor. I think that
6 takes us to the pleadings and other discovery matters. I think
7 here, just very quickly --

8 **THE COURT:** Hold on one second, I've got on my list
9 also --

10 **MR. GARDNER:** Sorry.

11 **THE COURT:** -- the Defendants' privilege log. They've
12 listed a Defendants' privilege log as an exhibit.

13 **MR. GARDNER:** Right, and it's not at all apparent to
14 me how a privilege log prepared by attorneys is at all relevant
15 in this case in terms of any issue.

16 **THE COURT:** What is the privilege log from your point
17 of view as to which there are references. Mr. Strawbridge,
18 what is the privilege log to which you're referencing? Is this
19 an attorney's privilege log, or what is it?

20 **MR. STRAWBRIDGE:** It was a privilege log produced in
21 discovery. I have had rare occasions, I will acknowledge
22 they're rare, don't necessarily anticipate them here --

23 **THE COURT:** Right.

24 **MR. STRAWBRIDGE:** -- where there ended up being a
25 dispute as to whether a document existed, whether the testimony

1 is going beyond the privilege that was previously asserted.
2 That's the only reason it's marked for identification. Don't
3 expect to offer it, but you never know, and that's the only
4 reason it's on our list. It is an admission by a party
5 opponent by their agents.

6 **THE COURT:** All right. Well, it seems to me as to
7 that we'll have to -- I really can't rule in advance on that.
8 I don't know how it would come up.

9 **MR. GARDNER:** That's fine.

10 **THE COURT:** At this point that motion as to a
11 privilege log will be granted subject to further review.
12 You're not going to get into a privilege log on the other side.

13 So that'll be granted, Anna. We'll handle the order from
14 chambers on that later today or tomorrow. All right.

15 So where we are is I think that we're at the deposition
16 transcript of Defendants' Rule 30(b)(6) designees.

17 **MR. GARDNER:** Right. And here it's a very simple
18 argument. As you will note in the pretrial order, the parties,
19 consistent with their 26(a)(3) obligations, the Plaintiff's
20 designated deposition testimony from the 30(b)(6), we
21 counter-designated, and those deposition designations and
22 counter-designations are in the proposed pretrial order.

23 **THE COURT:** Yes.

24 **MR. GARDNER:** In addition to that, Plaintiffs have
25 identified as an exhibit the entire Rule 30(b)(6) transcript

1 and we think that is simply inconsistent with Rule 26(a)(3)'s
2 obligation to do deposition designations.

3 Again, we're not challenging that it is the statement of a
4 party point. We're not making a hearsay objection. It's
5 really a more practical issue that what is the point of doing
6 deposition designations on the exact same transcript if the
7 Plaintiff is simply going to admit that entire transcript into
8 evidence, and then what, have the Court root through the
9 transcript about identification? It just doesn't seem like a
10 very practical way to proceed in light of the rules.

11 **THE COURT:** Mr. Strawbridge.

12 **MR. STRAWBRIDGE:** Is it okay if I stand here, Your
13 Honor?

14 **THE COURT:** Sure. Absolutely.

15 **MR. STRAWBRIDGE:** We don't intend to shovel in the
16 entire deposition transcript. We marked it for identification.
17 It is an admission by a party opponent, and there may be
18 occasion to use even beyond the designations decided in advance
19 of trial a selection from that transcript at some point in
20 trial as an admission or in cross-examination. And that's the
21 only reason why it's marked for identification at this point.

22 **THE COURT:** All right. I understand. The motion in
23 terms of the Rule 30(b)(6) designees will be denied. I don't
24 see any basis for excluding it at this point in time. So the
25 motion in limine is denied as to that.

1 So then we're down to, we have a list of deposition
2 notices, Defendants' initial disclosures. We have the
3 Defendants' Preliminary Injunction Opposition Brief. What is
4 that? What is the purpose of that, Mr. Strawbridge? I don't
5 understand what that is?

6 It was just a brief of the entire -- we had the
7 preliminary injunction, and there was a brief filed by the
8 other side, what do you intend to do with that?

9 **MR. STRAWBRIDGE:** I mean, pleadings from a party are
10 admissions by a party opponent. They can be used for any
11 purpose, if necessary, at trial. We do not intend to admit
12 them at the beginning of the case. It's marked for
13 identification so that the parties know what we have and we can
14 use it at trial, if necessary.

15 **THE COURT:** Well, for that matter, they can introduce
16 any positions that they've taken that they think are
17 inconsistent?

18 **MR. STRAWBRIDGE:** Absolutely.

19 **THE COURT:** All right. Mr. Gardner, what's the point
20 of this?

21 **MR. GARDNER:** The point is this, Your Honor. First of
22 all, we can take these one at a time, and I can start with the
23 PI opposition. I have never had a trial, Your Honor, where a
24 party's litigating positions in a filed brief come into
25 evidence in the case.

1 **THE COURT:** Nor have I. I've never done it when I
2 practiced law and I've never done it on the bench. I've never
3 seen it in 50 years, quite frankly.

4 **MR. GARDNER:** I hear what my colleague is saying is
5 their exhibit list is both those exhibits that they actually
6 want to use and then there's documents that they're just
7 identifying that they may use for some purpose, if not for
8 admission. That's, frankly, not the way I've ever done an
9 exhibit list. My exhibit list are the documents I will use or
10 may use to get into evidence.

11 **THE COURT:** The realities is, Mr. Strawbridge, on this
12 it's a matter of record in the court file. And in a bench
13 trial -- the opposition briefs, the briefs back and forth are
14 all part of the record in the court file and to the extent that
15 there's a bench trial, the Court can refer to what's in the
16 docket reference, essentially.

17 **MR. STRAWBRIDGE:** I agree that all of these filings
18 are subject to judicial notice. I actually have had the
19 occasion to use a pleading by a party at some point.

20 **THE COURT:** I'm trying to think, I really -- I don't
21 think I've ever had an opposition brief be an exhibit in a
22 case, either when I was practicing or on the bench. But I'm
23 not saying you're wrong about it. It's just highly unusual.

24 I mean, basically, in a bench trial the Court's referred
25 to something as a matter of record in the case file. And I'm

1 free to look at anything that's in the case file in terms of,
2 for example, legal positions that are taken or amended as the
3 trial proceeds. I'm free to look at that on either side it
4 seems to me. I don't know that we have need to have that be
5 marked as an exhibit.

6 **MR. STRAWBRIDGE:** I understand the point. We have
7 occasionally cross-examined a factual witness about a factual
8 assertion that was made in a pleading by their attorney who is
9 an agent of a party.

10 So, again, the odds that we're going to seek to admit
11 certainly the entire document at trial is exceedingly small. I
12 told that to Mr. Gardner before he filed the motion, but it is
13 possible and that's why it's marked on the --

14 **THE COURT:** I'm going to grant that as to the
15 opposition brief.

16 And then you have the amicus brief filed in the *Harvard*
17 lawsuit. As I recall, that's pretty extensive. Are we talking
18 about all of the amicus briefs filed in the *Harvard* lawsuit?

19 **MR. GARDNER:** No, Your Honor. It's just the one
20 amicus brief that was filed by the former military officials
21 who were opposed to the consideration of race in the admissions
22 process.

23 Now, I took what Your Honor said earlier to suggest that
24 those positions of former officers could potentially be
25 relevant in the case. And to the extent that the Court doesn't

1 believe they're hearsay or being used for hearsay purpose, as
2 long as both sides have equal opportunity to admit those amicus
3 briefs because I will represent to you --

4 **THE COURT:** Well, let me -- I'm glad this is on the
5 list because as far as I'm concerned in terms of amicus briefs
6 in appellate argument and the extent to which those briefs
7 would be relied upon in terms of the trial in this case as to
8 either side, I don't see any basis for any of them to be
9 admitted.

10 I'm not the least bit interested in hearing from an amicus
11 brief from some profound expert who is not in my courtroom,
12 whose credibility I can't judge and just put that as part of
13 the file.

14 So neither side is going to be permitted just to unload on
15 people opining and they're qualified as experts. I'm not the
16 least bit interested in it. If they want to come in and
17 testify, they testify. And that's my role here as the
18 gatekeeper. And in terms of on the appellate level it's a
19 different situation.

20 But I don't see any basis for either side to summarily
21 file an amicus brief. To the extent that there's an amicus
22 brief filed and someone wants to come forward as an expert
23 witness and testify, and they have an expert opinion, that's
24 fine. I don't care.

25 Mr. Strawbridge, with respect to any amicus brief, are you

1 planning to try to introduce amicus briefs here?

2 **MR. STRAWBRIDGE:** Only to the extent they become
3 relevant somehow to the testimony. We're not going to just
4 shovel in an amicus brief.

5 **THE COURT:** Okay.

6 **MR. STRAWBRIDGE:** Although the Defendant has also
7 marked several amicus briefs on their list.

8 **THE COURT:** Well, on both sides. I'm just telling
9 you, with respect to that, if you're cross-examining someone's
10 expert and you say, by the way, you understand that General
11 Putin has an opinion from the Russian military, well, thank you
12 very much, I'm really not interested in that -- pursuing that
13 line of cross. It's as simple as that. I don't know how else
14 to tell you other than that's not -- it's of no moment to me to
15 say are you aware that X says such-and-such? Well, no, I'm
16 not. Would you reject it? We're not going to go there.

17 We have plenty of people who are going to give opinions in
18 this case, and I'm going to give a fair amount of liberality
19 who is going to come forward, but I have to judge that and I'll
20 have to judge them on their cross-examination.

21 I don't see any place for amicus briefs to be listed by
22 either side, quite frankly.

23 **MR. STRAWBRIDGE:** We understand your position, Your
24 Honor.

25 **THE COURT:** And, Mr. Gardner, from your point as well,

1 if you intend to file any amicus briefs --

2 **MR. GARDNER:** Again, Your Honor, I think one of the
3 animating principles of our motion was to make sure we are all
4 on the same page --

5 **THE COURT:** That's fine, that's fine.

6 **MR. GARDNER:** -- we all have the same rules. It's
7 completely fine, Your Honor.

8 **THE COURT:** That's fine. All right.

9 You have that one, Anna? Okay.

10 And here's a sensitive one here. I think we need to
11 address from both sides here, various news articles, reports
12 and similar materials. I'm cautioning everyone here, when it
13 comes to the matter of news articles and op-ed pieces and that
14 kind of thing, I'm not particularly interested in that. It's a
15 matter of what happens here in this courtroom and evidence.

16 You certainly can cross-examine people if it comes up in
17 terms of -- at least, hypothetically, a witness says I'm not
18 aware of any opposition on X, Y and Z and someone can confront
19 them, and you're not aware of the fact that there was a front
20 page news article in the Wall Street Journal about this. And
21 you can confront them. And I'll give a fair amount of
22 liberality to that in that context. But just to try to
23 introduce news articles, they're not statistical studies in
24 terms of my gatekeeper function. There's no methodology that's
25 been presented, and there's no indicia of reliability one way

1 or the other.

2 And so news articles aren't just going to be tabbed as
3 exhibits and come in. But it doesn't mean that there may not
4 be a time when a witness is examined on that. And it just
5 depends upon the context.

6 If there's some obscure article written by someone whom
7 I've never heard of who is opining of something and is sort of
8 a way to try to bring in backdoor hearsay, I'm just going to
9 probably sustain an objection.

10 But it's perfectly appropriate for either side to confront
11 the witness of other side with respect to an item that may
12 clearly be a matter of general public knowledge and to say that
13 it was not a factor, we don't consider it, I think that's, you
14 know, I'm not going to just grant a motion summarily that we're
15 excluding all news articles.

16 I'm just trying to caution everyone that no one should be
17 expecting just to load up the file with those kinds of
18 exhibits. And I suspect you all -- you all obviously know what
19 you're doing on this, and so I don't expect that to be a
20 problem.

21 Mr. Strawbridge, do you understand what I'm saying on
22 this?

23 **MR. STRAWBRIDGE:** Absolutely, Your Honor.

24 **THE COURT:** Do you understand, Mr. Gardner?

25 **MR. GARDNER:** Absolutely, Your Honor.

1 **THE COURT:** I'm not going to grant this. This matter
2 of news articles, reports and similar, it'll be denied at this
3 point in time but we'll address it later if it comes up.

4 **MR. GARDNER:** Could I ask one clarifying question?

5 **THE COURT:** Sure.

6 **MR. GARDNER:** It's really more of a legal point. I
7 understand Plaintiffs to be taking the position that under
8 Federal Rule of Evidence 703, otherwise admissible evidence
9 relied on by the expert can be admitted into evidence. And
10 that is not I think a correct reading of 703 at all.

11 703 says that an expert can rely upon hearsay, that
12 doesn't make that hearsay independently admissible.

13 **THE COURT:** 703 relates to the bases of an expert's
14 opinion.

15 **MR. GARDNER:** That's exactly right. And the committee
16 notes from the 2000 amendments could not be clearer about the
17 fact that that does not make that hearsay --

18 **THE COURT:** Do you want Ms. Yang to address this point
19 or do you want to address this, Mr. Gardner?

20 (Laughter.)

21 **MR. GARDNER:** I think we're of the same minds about
22 this.

23 **THE COURT:** She's your expert on the rules and I'm
24 sure the other side has got one as well.

25 **MR. GARDNER:** Catherine is my expert on those things.

1 **THE COURT:** It's always dangerous for the older
2 lawyers to be talking about these things. It's usually better
3 to defer to the younger lawyers.

4 (Laughter.)

5 **MR. GARDNER:** Fair enough. My only point, Your
6 Honor --

7 **THE COURT:** Mr. Connolly and Mr. Norris do you have an
8 opinion this?

9 (Laughter.)

10 **THE COURT:** At a certain age people stop reading the
11 amendments and they expect the younger lawyers to do it.

12 **MR. GARDNER:** As a guy who works on the rules
13 committee, I wish I had that luxury, but I don't.

14 (Laughter.)

15 **MR. GARDNER:** So having said that, Your Honor, I do
16 think there is a substantive disagreement between the sides to
17 whether 702 is actually a rule of admissibility rather than
18 simply a rule that allows a basis for an opinion to be
19 otherwise inadmissible evidence.

20 And our view is 703 is not a rule of admissibility. It is
21 simply a rule that permits an expert to otherwise rely upon
22 inadmissible testimony so long as --

23 **THE COURT:** So 703 specifically says that the evidence
24 need not be admissible for the opinion to be admitted.

25 **MR. GARDNER:** That's exactly right. We are not

1 challenging the admissibility of an opinion, we are challenging
2 the underlying basis of the hearsay exhibits which Plaintiffs
3 claim --

4 **THE COURT:** That's one of those I can deal with it
5 when it comes up.

6 **MR. GARDNER:** Fair enough.

7 **THE COURT:** I'm pretty confident about that.

8 I don't need to grant that motion. That'll be denied. If
9 it comes up, I'll deal with it. I understand that.

10 I'm very sensitive to -- I think it's Rule 805, to hearsay
11 within hearsay. And you're correct, it's often overlooked
12 particularly, for example, like in medical reports it happens
13 all the time.

14 **MR. GARDNER:** That's right, Your Honor.

15 I think, by my list, that I think takes care of just about
16 every general objection we had.

17 **THE COURT:** All right. Okay. Go ahead.

18 **MR. GARDNER:** As always, Ms. Yang is correct, there
19 was the one outstanding issue of the attorney declaration from
20 Mr. Hasson. I understand from my colleagues' opposition brief
21 that they don't intend to offer into evidence that declaration.
22 That declaration, I would note, intends to authenticate a wide
23 variety of exhibits, many of which themselves are hearsay.

24 I understand from Your Honor that you would take up those
25 hearsay objections as they come up. So it may not be something

1 we need to address immediately, but I'm certainly prepared to
2 address that if you would like.

3 **THE COURT:** Why don't you go ahead at least initially
4 and -- Mr. Strawbridge, you will be ready to respond.

5 Which attorney is this, again? I'm sorry.

6 **MR. GARDNER:** It's James Hasson. So what happened,
7 just so you know, Your Honor, during the preliminary injunction
8 motion Mr. Hasson filed a attorney declaration seeking to
9 authenticate a wide variety of both newspaper articles, I think
10 one is from a Congressperson's website. I mean, there's a wide
11 variety of sort of various exhibits that are attached to this.

12 Certainly, the declaration itself not admissible into
13 evidence, it's the statement of an attorney. And if Mr. Hasson
14 I suppose wants to take the stand to try to authenticate
15 exhibits he certainly could.

16 **THE COURT:** Where are we on that, Mr. Strawbridge?

17 **MR. STRAWBRIDGE:** We're not going to offer that. It
18 does raise a question that I think we would benefit, and this
19 might transition us into the pretrial order discussion, which
20 is I think some of the information that we received from Your
21 Honor's clerk indicated that there might be a desire, obviously
22 not hundreds of exhibits, but for the parties to meet and
23 confer and agree to the preadmission of certain exhibits.

24 **THE COURT:** That's fine.

25 **MR. STRAWBRIDGE:** We are happy to do that. There are

1 a number of documents that I don't think there's a reasonable
2 objection to foundation and authenticity. The key documents in
3 the case we're talking about.

4 **THE COURT:** Sure.

5 **MR. STRAWBRIDGE:** I guess we would like to inquire of
6 Your Honor if you would like us to try to do that?

7 **THE COURT:** Yeah, I don't anticipate having to get too
8 deep into the weeds in terms of authenticity. I think you
9 should be able to work that out.

10 With respect to -- with respect to website prints of
11 congressional declarations of Members of Congress, I think we
12 could probably avoid that. It would be a good idea.

13 **MR. GARDNER:** Your Honor, if I may just ask, we'll do
14 whatever you want to do, there is a very large number of
15 exhibits, frankly, on both sides that are unobjected to. Would
16 your preference be to preadmit all of those exhibits now?

17 **THE COURT:** That would be a wonderful idea. As a
18 matter of fact, you could assign all the younger lawyers here
19 to stay in the courtroom and not go, I think between now and
20 midnight they could get it all done.

21 (Laughter.)

22 **MR. GARDNER:** And then one follow-up to that, does
23 Your Honor have a preference, once all of those exhibits are
24 preadmitted, do those exhibits need to be discussed by a
25 witness on the stand for Your Honor --

1 **THE COURT:** No, under our Local Rule 107.5, our local
2 rule provides that to the extent that there are exhibits that
3 are referenced and once they hit that TV screen they are in
4 evidence. Although it's very important in a jury trial, and a
5 bench trial, that's what the local rule provides. 107.5
6 specifically says that to the extent items are referenced and
7 witnesses start to talk about them, they're deemed to be
8 admitted unless there's an objection noted earlier. So to that
9 extent that would be very helpful. You could just note that
10 and either side starts and you can have a joint exhibit book.

11 As we're into this topic, this is getting in, as
12 Mr. Strawbridge notes, to the matter of the pretrial discussion
13 and pretrial order. But with respect to these massive
14 loose-leafs and all of the written materials, they're obviously
15 part of the record. We're going to be pounding through them
16 after we finish the trial.

17 But in terms of the trial itself, these TV screens have a
18 purpose, and it saves inordinate amount of time to put it up on
19 the screen so nobody has to be stopping and lifting up the
20 books. To that extent, you all can be ready to try to put
21 these things up on the screen, if they're in evidence, there's
22 no dispute and off we go and get it up on the screen. It's
23 much easier than trying to go back and forth.

24 Yes, Mr. Mortara.

25 **MR. MORTARA:** Your Honor, that's exactly the way we

ordinarily do things on our team.

Couple of things, one, usually our friends want a hard copy of what we're using --

THE COURT: That's fine.

MR. MORTARA: -- for the witness so we'll do that. And sometimes the Bench wants a hard copy of the exhibit. If you're saying you don't want that, that's one less --

THE COURT: No, Mr. Mortara -- am I pronouncing your name correctly?

MR. MORTARA: Right.

THE COURT: My point is we're going to need the hard copy because we have a lot of work to do after the case is over in terms of issuing an opinion, findings of fact, conclusions of law and an opinion.

But in terms of the presentation in the courtroom, I don't stop and grab the notebooks and start paging through. It breaks up the witness testimony. And in terms of the lawyers, it's easier for you to keep rolling and just -- you both will have to have IT people that will have these -- so these screens will work.

And I strongly urge -- Jakiba, you are assigned for the trial of this case? Oh, you're not. Who is?

THE CLERK: Nobody yet.

THE COURT: Tell Catherine we need to have somebody, you understand? I'd like to know who it's going to be, okay.

1 In fact, I may recruit you, Jakiba, maybe you'll do it.

2 **THE CLERK:** That's fine.

3 **THE COURT:** You're hired.

4 **MR. MORTARA:** Your Honor, for the record, Plaintiffs
5 have a little bit of an objection. Earlier today Madam Clerk
6 referred to one of my colleagues as handsome and not me.

7 **THE COURT:** What?

8 (Laughter.)

9 **MR. MORTARA:** She referred to one of my colleagues as
10 handsome and pointedly did not say that about me.

11 **THE COURT:** Well, that's quite all right.

12 (Laughter.)

13 **THE COURT:** Objection is noted and overruled. Just
14 get used to it, Mr. Mortara. I had a woman on the tennis court
15 the other night say "Thank you, sir," when I handed a ball back
16 to her I said, "Don't call me, sir, please, on the tennis
17 court." It's either "Your Honor" or don't call me that way.

18 (Laughter.)

19 **THE COURT:** We're laughing here.

20 My point is is that in terms of the flow of evidence, the
21 screens work well, but I would make sure that you -- we line
22 this up ahead of time with whoever the clerk of the court is,
23 IT is standing by so we don't have any glitches, and off we go.

24 But we will need hard copies of everything, not only each
25 side, but I'm going to need hard copies of everything because

1 I'm not going to be coming back in here to try to put things up
2 on the screen. But it really does work well if you do the IT
3 ahead of time.

4 We're going to start Monday, September 16th, but if you
5 want to be here Friday the 13th and try to -- have a trial run,
6 come on over early, I don't care. You can do it. Whatever you
7 want to do.

8 **MR. MORTARA:** Madam Clerk and I already discussed
9 that. We intend to make a visit on Friday, and I'm sure the
10 Justice Department, they always have very good IT, our IT
11 people were going to work it out with I think Ms. Hudson what
12 time we're going to be here.

13 **THE COURT:** That's fine.

14 **MR. MORTARA:** And if you want to do it at the same
15 time so we can all be here at the same time.

16 **MR. GARDNER:** Your Honor, just for your preference,
17 would you prefer two sets of the complete copy of hard copy
18 exhibits, one for you and for your clerk?

19 **THE COURT:** No, no, one set is fine.

20 **MR. GARDNER:** One set. Sorry, I didn't mean to
21 interrupt you, please.

22 **MR. MORTARA:** So binder for the bench, potentially
23 binder for the witness, binder for the other side. Is that
24 okay with you, Mr. Gardner?

25 **MR. GARDNER:** That's acceptable. Now, one question I

1 do have --

2 **THE COURT:** I will say, by the way, Mr. Mortara, in
3 terms for the witness it also is quicker as opposed to a
4 massive notebook for him or her to page through, again, to have
5 them be able to look at the screen and respond. The screen is
6 such, I'm sure you realize, they can circle a key phrase and
7 once it's done you just hit the bottom and the circling goes
8 off the screen. But that's helpful as well.

9 **MR. MORTARA:** Your Honor, I may actually persuade you
10 with something right now. Some of our direct examinations for
11 the Plaintiffs will be adverse directs.

12 **THE COURT:** That's fine.

13 **MR. MORTARA:** Because of that, I think it might make
14 sense to give the adverse witness the entire set of documents.

15 **THE COURT:** That's fine. That's fine.

16 **MR. MORTARA:** Because I think for completeness
17 purposes and for the witness' comfort that things are not being
18 taken out of context. If that's okay, I prefer to do that.

19 **THE COURT:** That is perfectly fine. With respect to
20 the -- under Rule 607 you're perfectly free to call adverse
21 witnesses and you can attack the credibility or challenge.
22 Either side can do that.

23 **MR. MORTARA:** We are working that out with the Justice
24 Department, including witness order, which we anticipate being
25 able to transmit to the Justice Department next Tuesday,

1 including which witnesses we're going to call adverse of
2 theirs. Theirs is a very busy schedule, particularly at
3 Pentagon as I understand it, they have some very high-ranking
4 witnesses on their list. So we're going to work with them on
5 that. Next Tuesday we can do that.

6 **MR. GARDNER:** I will say, Your Honor, next Tuesday is
7 a little late for us because as you can imagine, like
8 Mr. Mortara said --

9 **MR. MORTARA:** We can do it earlier.

10 **MR. GARDNER:** That would be terrific. We do have some
11 very high-level officials who we can't just block off time for
12 so the more specificity we can get the earlier, the more we can
13 guarantee they will be here in the chair.

14 **MR. MORTARA:** Monday?

15 **MR. GARDNER:** Sunday? We can negotiate this outside
16 of court.

17 **THE COURT:** Actually, I will say this, Mr. Gardner and
18 Mr. Mortara, whenever references are made to weekends, the
19 younger lawyers in the courtroom shrivel up on each side of the
20 courtroom because it's always the way it works is the older the
21 lawyer the less likely he or she is worrying about the weekend,
22 and the younger the lawyer the more he or she is aware that
23 that time is being taken by them.

24 So I would suggest that both sides talk to the younger
25 lawyers what is feasible in fairness to the younger lawyers.

1 **MR. GARDNER:** I so wish that were true, Your Honor.

2 **THE COURT:** And while we're talking about technology,
3 by the way, there's an unstated rule here that basically I've
4 observed that anybody over the age of 45 really should not
5 touch the technology that's in the courtroom, okay. So I'm
6 counting on the younger lawyers, whatever, to be ready to stand
7 by in case something goes wrong on either side. The older
8 lawyers are told leave it along and let the younger lawyers get
9 to it. It usually works pretty well that way.

10 **MR. GARDNER:** That's fine, Your Honor. Can I ask just
11 two more housekeeping questions about the exhibits?

12 **THE COURT:** Sure.

13 **MR. GARDNER:** One, do you want us to file a joint
14 motion with the Court to preadmit all of the exhibits for which
15 there are no objections on either side?

16 **THE COURT:** You can do that if you want, sure.

17 **MR. GARDNER:** Then the second question I have is I had
18 an understanding from the local rules that we had to number
19 each exhibit sequentially. So if I had Defendants' Exhibit 20
20 but it's the first exhibit coming in I would remark that --

21 **THE COURT:** No, you don't need to create that work.
22 It may be a local rule but also buried in the local rules are
23 subject to the trial judge. So I will tell you, you do not
24 need to have the very first exhibit that comes in does not have
25 to be number one.

1 **MR. GARDNER:** Thank you. That was going to be a
2 logistical nightmare for both of us.

3 **THE COURT:** And sometimes if that happens in a jury
4 trial the jurors are like, well, we have Exhibits 102 through
5 350, what happened to the others? And I have to explain don't
6 worry about it. Well, you don't have to worry about it in the
7 bench trial.

8 **MR. GARDNER:** Exactly.

9 **THE COURT:** So just number your exhibits. To the
10 extent the local rule would suggest that, that's waived.

11 **MR. GARDNER:** Sure. Finally, do you have a
12 preference, Your Honor, as to whether the exhibits that the
13 parties agree to that have no objections coming in, should we
14 mark those as JXs or joint exhibits?

15 **THE COURT:** That's a good idea. That helps.

16 **MR. GARDNER:** I think that's doable on our end.

17 **THE COURT:** Joint Exhibits, plaintiff's exhibits,
18 defense exhibits, those three categories and that's fine. We
19 can go from there.

20 Are we finished with your Motion in Limine? I think we
21 are.

22 **MR. GARDNER:** I think we finished a few minutes ago.
23 I think we've covered all of the issues. I think we've
24 resolved every single issue that is the subject of the Motion
25 in Limine.

1 **THE COURT:** I've ruled. Is there nothing further from
2 the Plaintiff on those motions? I think we've dealt with it
3 seriatim.

4 **MR. GARDNER:** Correct.

5 **THE COURT:** Here you go, Elizabeth. Thank you.
6 Let's see, I was thinking we might break for lunch and
7 come back after lunch but I've got a feeling we can do this and
8 keep rolling.

9 Ronda, how you doing?

10 **THE COURT REPORTER:** I'm good.

11 **THE COURT:** All right. Looking here, the first thing
12 I would note is in terms of the pretrial order, which has been
13 filed pursuant to local Rule 106, is -- I have a list here of
14 21 witnesses and eight of those witnesses it appears are going
15 to be called by both sides, I think. So let me go down the
16 list here.

17 We have, in terms of alphabetical order, we have -- there
18 are John Fuller is listed as being called by the Plaintiffs and
19 by the defense.

20 Jeanette Haynie is a Defendants' expert that the Plaintiff
21 expects to call and the defense is going to call.

22 Melody Hwang is listed by both Plaintiff and Defendant.

23 Stephen Latta is listed by both the Plaintiff and
24 Defendant.

25 Captain Ed Sundberg is listed by both the Plaintiff and

1 the Defendant.

2 Lisa Truesdale, Defendants' expert, is listed by both the
3 Plaintiff and the Defendant.

4 Steven Vahsen is listed by both the Plaintiff and the
5 Defendant.

6 And Ashish Vazirani is listed by both the Plaintiff and
7 the Defendant.

8 Is that correct from your point of view, Mr. Mortara?

9 **MR. MORTARA:** It's correct subject only to the
10 following observation. We have an agreement on scope with the
11 Department of Justice so it's our intention that each witness
12 will only testify once, and then the cross-examining attorney
13 for any adverse directs that we might use, Mr. Gardner and his
14 team can exceed the scope of the direct.

15 **THE COURT:** Yes.

16 **MR. MORTARA:** Absent somebody coming back for the
17 rebuttal case that Plaintiffs -- we haven't done it in any SFFA
18 trial, have we? We've never done a rebuttal case. Absent the
19 remote possibility of a rebuttal case, I wouldn't anticipate
20 the witness taking the stand twice.

21 **THE COURT:** That's fine. In terms of Rule 607 anyway,
22 in terms of you're not limited to challenge a witness whom you
23 call, routinely, both sides have -- both sides can question to
24 whatever extent you want. You're not limited by the scope.

25 For example, those eight witnesses, when the Plaintiff

1 calls them, the defense can offer testimony as well. And we go
2 as long as we have to go on either side. It's not limited to
3 the scope or anything else. The defense is free to do whatever
4 it wants to do once you call that witness, not only
5 cross-examining but as a proponent of that witness.

6 There's very loose limitation on that because it's a
7 witness offered by both sides and the witness does not need to
8 then be recalled by the Defendant, nor does the Defendant waive
9 rights in terms of at the conclusion of the Plaintiff's case
10 because of evidence that it came in in the Plaintiff's case. I
11 think that's about as clear as I can explain it.

12 But I'm trying to, first of all, verify that they're the
13 only eight witnesses of the 21 who are listed by both sides?

14 **MR. MORTARA:** I think that's correct. But
15 Mr. Strawbridge is writing me and telling me to tell you that
16 we've been working on our witness order and who we're
17 calling --

18 **THE COURT:** Okay.

19 **MR. MORTARA:** -- there may be an update. Would the
20 Court like an updated witness order from us?

21 **THE COURT:** Yes, I think what would really be helpful
22 is to have an updated witness list. And we've starred at least
23 eight of the 21 listed as witnesses who are going to be called
24 by both sides.

25 And to the extent that you know the order that they're

1 going to be called, I, personally, think that -- we have some
2 really high-quality lawyers here who have done a lot of
3 litigation -- I'm sure this is the obvious, I don't have to
4 tell you this but just in an abundance of caution -- there's
5 absolutely no reason why each side can't tell the other side
6 who are going to be the witnesses and what order so it goes
7 smoothly.

8 I'm not favorably inclined when someone says we've changed
9 and we're going to call witness four now as number one today,
10 we've switched, because it's really not fair to the other side.

11 I just ask you, if there's a real reason why something
12 needs to be changed you all can talk about it as professionals
13 with each other certainly 24 hours beforehand. But unless
14 someone comes down as deathly ill, there shouldn't be any
15 change.

16 We'll have opening statements Monday, September 16th, and
17 then we proceed with witness testimony. You should be able to
18 tell them exactly who your witnesses are to start, and know
19 exactly what order you're going to have your witnesses in.

20 Obviously you've divided up the legal arguments here, and
21 I presume that you're going to divide up who's going to handle
22 what witnesses. So, to me, I just leave that up to you. But I
23 think it would be helpful to update the witness list.

24 And I would certainly hope -- I see no reason why
25 certainly by the middle of next week you can't have a clear

1 witness list from both sides in terms of who you anticipate
2 calling. That doesn't include the fact there may be rebuttal
3 witnesses that are called and because of the nature of this, I
4 more than understand, it may or may not be necessary to call
5 some other witnesses. And if that happens we'll deal with it.

6 That's why I've tried to allow a sufficient amount of time
7 here, and I believe we've allowed the appropriate amount of
8 time to try the case. If for some reason we run over, then
9 we'll just have to -- it's a bench trial. I'm not inclined to
10 have bench trials that are gapped. I think it's very difficult
11 for lawyers. So I never do that. Bench trial is treated like
12 a jury trial with me. It's consecutive days, start to finish.

13 I will say that the one -- the one exception here clearly
14 is I've never gone longer than a week and a half to two weeks,
15 max I think was three weeks to render an opinion in a bench
16 trial. That is not going to be the case here. Okay.

17 I've given it -- at least one of the previous cases I
18 noted was a 10-month delay. I certainly don't expect to stay
19 with that rule. I'll make every effort to do it within a
20 reasonable period of time, certainly this fall. In terms of
21 the number of witness and what's involved here and the clear
22 records that have to be prepared in terms of when the case goes
23 up, so to speak, so I realize I'm not going to be able to abide
24 by that rule.

25 I really don't want to break the trial up so I'm trying to

1 make sure we allow enough time that the entire case can be
2 tried. And if we need more additional days, and I start to
3 figure that in, in terms of having to continue to go and change
4 my calendar. So I don't anticipate taking testimony, stopping
5 for a week and a half and having two more days of testimony.
6 That's not going to be the way we're going to do it. That will
7 be my issue if we don't finish in time to start clearing days
8 off afterwards.

9 I say that so you all understand for your calendars,
10 you've got the calendars for the week of September 16 and
11 September 23. I don't think it's going to go into October.
12 But you all should keep your calendars open beginning of
13 October, I guess, is my point in case that were to happen.
14 Because I'll make my calendar work in that regard.

15 **MR. MORTARA:** Your Honor, hopefully it won't come to
16 that. I will say as to everything you just said, we are
17 picking up what you are putting down and 100 percent in
18 agreement.

19 In *Harvard*, almost all of our initial witnesses were
20 adverse and so we were very cooperative. And we will do the
21 same here and give them a complete order by next week, as well
22 as advise about adverse witnesses, I will endeavor to do
23 Sunday, as Mr. Gardner requested.

24 This leads to another matter though.

25 **THE COURT:** Sure. Go ahead.

1 **MR. MORTARA:** Do you want us on the clock or not, by
2 which I mean, do you want to divide the trial day into hours,
3 divide the hours into two halves and have us keep time?

4 **THE COURT:** I'd rather you all work this out among
5 yourselves.

6 **MR. MORTARA:** I'm very happy with the 50/50 keeping
7 time.

8 **THE COURT:** Yeah, I don't want the Plaintiff to take
9 80 percent of the time and say now we're finished. That's
10 fine. So I think you work it out yourselves, and I'll abide by
11 whatever clock you want.

12 I'm really not much inclined to put clocks on witnesses.
13 I'm pretty patient with that. We don't have a red, orange,
14 green light up here like the appellate court in terms of a
15 certain point. Occasionally I've said I think we've got 20
16 more minutes to go on this, for example. I just sort of nudge
17 people along. I think we've allowed plenty of time.

18 That is a good idea to indicate when you want to be
19 completed in terms of the Plaintiff's case and the defense case
20 starts.

21 In terms of Rule 50 motions and whatever at the end, let's
22 face it, we have two sides that have to present this case. I'm
23 not going to allow a whole lot of time for motions at the
24 conclusion of the Plaintiff's case in terms of the defense
25 case.

1 **MR. GARDNER:** I will represent to Your Honor, we're
2 not moving for that.

3 **THE COURT:** I wouldn't think so.

4 **MR. GARDNER:** I also appreciate the flexibility. I do
5 think there's the possibility witnesses may have to be taken
6 out of order. And, again, because we're not moving under Rule
7 50 I don't think there's a real issue as to when their case
8 ends and our case begins. It's a bench trial.

9 **THE COURT:** I think Mr. Mortara's point is well taken
10 in terms of dividing up. We'll have some target date when the
11 Plaintiff is finished and then when the defense case starts.
12 And allow a little bit of fudge room at the end for rebuttal on
13 either side and we'll go in that fashion.

14 **MR. GARDNER:** And Mr. Strawbridge and I have spoken
15 about this. I think the parties were in agreement we would
16 split the time 50/50. We would keep track. Recognizing that
17 keeping track is a little weird because Plaintiffs are calling
18 all of the Government's witnesses. We will figure this out.

19 **MR. MORTARA:** What time does court begin and what time
20 does it end?

21 **THE COURT:** I want court to begin at 9:30. But I will
22 confess that the one wiggle that I've had with taking senior
23 status is it's probably more realistic to start at 10. All my
24 clerks are rolling their eyes, I say we're going to start at
25 9:30 and I can hear them saying, yeah, right. We are going to

1 start at 10:00. I was good this morning. I was ready to go at
2 10:00.

3 We will start at 10:00 and we will go until 5:00. And
4 we'll generally take a break late morning, to two hours, and
5 then we take an hour for lunch and then go til 5:00. So we'll
6 start at 10:00. Usually there's a late morning or late
7 afternoon break.

8 It doesn't take as long. When we have a jury trial,
9 there's no such thing as a five or 10-minute break for a jury
10 trial because it takes forever to get the jurors back in. With
11 a bench trial, a five or 10-minute break is just about all we
12 need.

13 So we have one late morning break and one late afternoon
14 break for the court reporter, to give Ms. Thomas an opportunity
15 to get a break. But we'll go 10:00 to 5:00 all those days.

16 **MR. MORTARA:** Excellent, Your Honor.

17 **MR. GARDNER:** May I ask two clarifying questions?

18 **THE COURT:** Sure.

19 **MR. GARDNER:** One, this may not even be an issue, but
20 because almost every single witness is an out-of-town witness,
21 if a witness is on the stand and it's 5:00 and there's not much
22 more time to finish up to go somewhat past --

23 **THE COURT:** Sure, someone has to go get an airplane,
24 that's absolutely fine.

25 **MR. GARDNER:** Terrific. The second question is, do

1 you happen to know now, Your Honor, whether there's any
2 blackout dates within those two weeks where we have to end
3 early or start late?

4 **THE COURT:** No, I don't think so.

5 **MR. GARDNER:** Okay. Thank you. Great.

6 **THE COURT:** Can you have Chris run off my calendar for
7 those two weeks. That's a fair question. I don't think
8 there's any. I'm pretty sure we're totally wide open.

9 **MR. MORTARA:** What a great pleasure it is to be across
10 from a very experienced trial lawyer at the Justice Department.

11 Couple other things, we are invoking the rule with regard
12 to fact witnesses. I looked at the local rules and the local
13 trial rules, we would like fact witnesses excluded from the
14 courtroom while they're not testifying until they're finished.

15 **THE COURT:** Okay. Under Rule 615 in terms of
16 exclusion of witnesses.

17 **MR. MORTARA:** Correct.

18 **THE COURT:** Clearly -- I'm glad you brought that up
19 because I always -- no problem. We have the witnesses all sit
20 in the vestibule there, and they don't sit and listen, and I
21 explain this to juries all of the time.

22 But we have the issue with respect to experts and the
23 expert is entitled to listen to the opposing expert and vice
24 versa. And the reason I'm pausing on this, Mr. Mortara, is
25 because we have -- I suspect we're going to have some military

1 people on both sides who are testifying who are going to be
2 respected by me as experts and qualified as experts under Rule
3 702, and to the extent they want to hear what other witnesses
4 have said and they can opine, agree, disagree, whatever,
5 they're allowed to be in the courtroom.

6 So we can have an exclusion of witnesses under Rule 615
7 and, as I'm sure Ms. Yang will tell you because she's up on the
8 all of the amendments, she'll know that 615 was amended to also
9 note that there can't be general discussions about things.
10 Exclusion of witnesses means more clearly that witnesses can't
11 really be discussing their testimony with anybody else even,
12 you know, in terms of making sure that the Rule 615 is observed
13 carefully. And that's an amendment to 615.

14 So I'm not really sure how we navigate -- you all navigate
15 that in terms of whether there are witnesses here, at least it
16 occurs to me, both fact and expert witnesses. And I don't mean
17 there's been liberality in classifying people as experts
18 because, quite frankly, that falls to me to have some
19 liberality.

20 I basically respect people with military experience who
21 have an opinion about certain matters, about whether it's
22 cohesion -- cohesiveness or whatever. My point is that there
23 are some hybrid witnesses here.

24 So the only way I can suggest this is that you all discuss
25 among yourselves when certain witnesses are up who you believe

1 is qualified as a contrary witness who's allowed to sit and
2 listen to some of the testimony. And I'll deal with it
3 seriatim is the best way to do it, I think.

4 **MR. GARDNER:** I think that's fine, Your Honor. I
5 guess I'd say three things. One, we have no objection to the
6 rule, obviously the rule is the rule and experts are exempt
7 from that. We've got pure experts, not an issue at all.

8 Second, we will designate Dean Latta as our
9 representative, so he is exempt from the rule, as I understand.

10 **THE COURT:** Yes.

11 **MR. GARDNER:** I just wanted to put the Plaintiff on
12 notice that will be our corporate representative.

13 And the third thing is -- you put your finger right on the
14 issue I was going to raise -- I do think there will be some
15 complicators because many of our witnesses are hybrid fact
16 experts, but I think the parties can work that out privately.
17 I'm not sure we need to resolve that here.

18 **MR. MORTARA:** Anyway, Mr. Mortara, you know what I'm
19 speaking of. You decide. It's pretty clear. You all have to
20 figure out how we do this because there's fact testimony and
21 there's expert testimony and both sides are entitled to have
22 their experts listen on top of another.

23 And, quite frankly, in terms of how to break down the area
24 of expertise, they're really pretty much intertwined. All of
25 these military people have an expertise in military matters, be

1 it General Walker on whom we've ruled on earlier today. For
2 example, General Walker, he's a fact witness, expert witness
3 and the defense is entitled to have someone in the courtroom
4 when he testifies and vice versa. So I'll leave it to you to
5 try to figure that out.

6 **MR. MORTARA:** Your Honor, I think this may only be
7 relevant to one or two pure fact witnesses and, thank you,
8 Mr. Gardner, for the designation of Dean Latta. We're all set
9 for that.

10 The only other thing on my list, Your Honor -- well,
11 there's two. One is, do you have a time limit for openings and
12 closings or is it up to us and we're not on the clock
13 basically?

14 **THE COURT:** No, I don't care. I just like to know how
15 long you think.

16 **MR. MORTARA:** At this point I think less than 40
17 minutes.

18 **THE COURT:** Okay. And both sides, probably 40-minute
19 opening statements I presumed.

20 **MR. GARDNER:** Yeah, I mean, your Honor, I am deeply
21 concerned about the clock in this case. So I think the shorter
22 the openings the better. But I will self-regulate.

23 **THE COURT:** I'm not inclined to cut people off.

24 **MR. GARDNER:** That's fine. Just a follow up. I had
25 not understood that the Court wanted closings. Is that

1 something the Court wants to have --

2 **THE COURT:** Yes.

3 **MR. GARDNER:** -- and will that happen during the
4 two-week period?

5 **THE COURT:** Oh, I want closing. Absolutely. I want
6 opening statements and I want closing.

7 **MR. GARDNER:** That sounds good.

8 **THE COURT:** Just in case I've missed something, I want
9 to make sure that I know it's important to you all and --

10 **MR. MORTARA:** Your Honor will get an opening statement
11 from me and, anticipating you'll be tired of me, you will
12 receive a closing statement from Mr. Strawbridge.

13 **THE COURT:** And, Mr. Gardner, who's going to make the
14 opening statement for you?

15 **MR. GARDNER:** That will be me, Your Honor, and
16 Ms. Yang will be doing closing.

17 **THE COURT:** And Ms. Yang will be the closing, okay.
18 So that sits well with all of the other younger lawyers who
19 worked really hard on this case?

20 **MR. MORTARA:** Well --

21 (Laughter.)

22 **THE COURT:** They may want to have an opinion --

23 **MR. MORTARA:** Mr. Hasson is a U.S. Army Ranger but
24 he's also the father of a one week old. So we would have him
25 do it but unfortunately --

1 **THE COURT:** I think if he's a father of a one week old
2 you said? One week?

3 **MR. HASSON:** Week and a half, Your Honor.
4 (Laughter.)

5 **THE COURT:** Who is that? That is Mr. Hasson?

6 **MR. HASSON:** Yes, Your Honor.

7 **THE COURT:** You may be violating a federal statute by
8 being here, Mr. Hasson. I'll leave that to you. Week and a
9 half, well, congratulations.

10 **MR. HASSON:** Thank you very much.

11 **THE COURT:** Is this your first?

12 **MR. HASSON:** Second, Your Honor.

13 **THE COURT:** Whatever it is, it's not going to be as
14 long as it was for the first so don't worry about it.

15 (Laughter.)

16 **MR. MORTARA:** Thank you, Your Honor. Then the last
17 thing on my list about I've looking down at my list --

18 **THE COURT:** Okay, go ahead.

19 **MR. MORTARA:** -- that I had for you is I read the
20 local rules very closely. I must say I'm very expressed by the
21 local trial rules. I've never seen anything like it. There is
22 a strong rule about the use of mobile phones.

23 **THE COURT:** Yes. Good point, actually. I have a
24 thing over here, essentially, the matter with electronic
25 devices is pursuant to Local Rule 506 and the standing order

2016: Unless authorized by the presiding judge proceedings may not be recorded, photographed, broadcast, or transmitted outside the courtroom. Counsel of the record in the case may use electronic devices for approved purposes, i.e. to check email or calendars, perform case-related legal research during court proceedings while seated at counsel table. Otherwise, unless permitted by the presiding judge, electronic devices may not be used in the courtroom and must be turned off. And use of electronic devices in violation of this policy may subject the device to confiscation and inspection to determine whether court proceedings have been recorded, photographed, broadcast, or transmitted outside of the courtroom. So by entering the courtroom with electronic devices, visitors and counsel will be deemed to have consented to this confiscation and inspection of any device.

So the simple fact of the matter is is that you can't record anything, nor can anybody come into the courtroom and record it. But you certainly are allowed to have your iPhones in terms of checking calendar issues and, quite frankly, as a matter of an honor system to do quick research.

MR. MORTARA: I wanted to clear that with you. Many of us are using mobile phones to provide internet access.

THE COURT: I understand. The reason for that is is because we recognize that there may be some reference to something where someone quickly just tries to check what the

1 reference is, and you're allowed to do quick legal research
2 there.

3 **MR. MORTARA:** Thank you, Your Honor. I just wanted to
4 make sure we're okay.

5 **THE COURT:** That's fine.

6 **MR. MORTARA:** I have nothing else.

7 **MR. GARDNER:** I have just four very quick things, Your
8 Honor.

9 **THE COURT:** Okay, that's fine. Before I forget, in
10 terms of my calendar, I think Mr. Mortara asked this. I have
11 Thursday, September the 19th, I have a family obligation at
12 5:30, as long as we finish by 5:00. I can't afford to go late
13 on Thursday, September the 19th.

14 In light of Mr. Hasson's obligations, I'll tell you that I
15 have to assist babysitting the youngest of my seven
16 grandchildren, who is clearly the least well behaved of all of
17 the seven, without question. Hands down, he's earned that
18 already on his fourth birthday this week, so. Great kid but
19 you've got to watch him. So I've got to help my wife with
20 that.

21 (Laughter.)

22 **THE COURT:** Anna, remind me on the CJA meeting for
23 Tuesday, September 17, I'm going to move that around. I'll
24 move it up. I'll figure it out. But I'm not going to do it on
25 the 17th.

1 Then the following week -- yes, I'm good that entire week.
2 No restrictions at all.

3 Anything else, Mr. Mortara, from your point of view?

4 **MR. MORTARA:** Absolutely nothing from us, but
5 Mr. Gardner has four questions.

6 **THE COURT:** Mr. Gardner, you have a few things. Go
7 ahead.

8 **MR. GARDNER:** Four very quick things. I have a
9 recollection from, I think it was the PI hearing, that you did
10 not want posttrial proposed findings of fact and conclusions of
11 law, is that --

12 **THE COURT:** No, I want proposed findings of fact and
13 conclusions of law when you finish your case, which means that
14 you -- if you don't have it the same day, generally, I prefer
15 to have proposed findings of fact and conclusions of law
16 submitted simultaneous with your closing arguments at the end
17 of the trial. But this is a little different. I recognize
18 this is a little different and a little bit more extensive.

19 So certainly with closing arguments say, hypothetically,
20 targeted for Friday, September 27th, 9th or 10th day of the
21 trial, I would want proposed findings of fact and conclusions
22 of law submitted --

23 (Court conferring with law clerk.)

24 **THE COURT:** Are you talking about the pretrial
25 order -- you've already got that. But you mean at the end of

1 the case?

2 **MR. GARDNER:** No, no, no, so both sides filed
3 yesterday pretrial. I'm asking posttrial.

4 **THE COURT:** No, I understand what they're saying. The
5 point is is that in terms of -- sometimes the proposed findings
6 of fact and conclusions of law may be different than what
7 you've had in your pretrial order. So I do still -- you don't
8 have to necessarily change it, hopefully you don't.

9 But my point is is that when you have closing argument on
10 let's say hypothetically Friday, the 27th of September, that
11 following week, certainly by Wednesday or Thursday, I would
12 want your proposed findings of fact and conclusions of law.
13 And you can summarize the evidence, you can summarize what
14 you've said in your closing.

15 And I want that certainly within a week thereafter of your
16 closing arguments.

17 In light of the extensive record here on this case,
18 normally I would require the same day as you're making your
19 closing argument, but I'll give you a little wiggle room on
20 that in terms of everyone being fairly busy, and particularly
21 in terms of all of the lawyers in this case.

22 So within a week of your closing arguments. I don't want
23 you to be submitting proposed findings of fact and conclusions
24 of law three weeks after the closing argument. It's going to
25 be within a week.

1 **MR. MORTARA:** Understood, Your Honor.

2 **THE COURT:** I would want it by Wednesday the following
3 week. Elizabeth, remind me of that. By Wednesday of the
4 following week I would want proposed findings of fact and
5 conclusions of law.

6 **MR. MORTARA:** We will do that. And it helps, if it
7 aids the Court, we'll try to put in transcript cites and things
8 of that nature that direct the Court to the evidence that we've
9 supported. I assume Mr. Gardner will do the same.

10 **THE COURT:** That's fine.

11 **MR. GARDNER:** Assuming the transcripts are available.
12 That's going to be the one limitation.

13 **THE COURT:** I'm sorry, what?

14 **MR. GARDNER:** Assuming the transcripts are available.

15 **THE COURT:** Ms. Thomas, I believe, is going to be
16 doing daily copy for you all. So that's fine.

17 **MR. GARDNER:** So that was the first thing on my
18 agenda.

19 **THE COURT:** Is that all right with you, Ronda?
20 Ms. Thomas, is that okay with you? Does that work?

21 **THE COURT REPORTER:** Yes, Your Honor. We are working
22 that out.

23 **MR. GARDNER:** The second is a very minor question I
24 have for you. Do you have a presumption about approaching
25 witnesses? Do we need to ask each time we want to approach?

1 Do we have standing approaching rights?

2 **THE COURT:** Mr. Gardner, I'm laughing because in my
3 day I was a great roamer.

4 **MR. GARDNER:** As am I.

5 **THE COURT:** So it would truly -- my colleagues
6 professionally, and particularly those against whom I had
7 cases, would laugh if they heard me say you've got to stand at
8 the table and you can't move because that was literally
9 impossible for me to do that.

10 **MR. GARDNER:** I have the same problem.

11 **THE COURT:** We don't need to be at the end of the jury
12 box over here because there's no jury. But I don't care. You
13 can sit at the table, you can stand at the table, you can stand
14 at the podium, you can approach the witness. You don't have to
15 ask for permission to approach the witness.

16 The only thing is for -- one of my colleagues -- I don't
17 let you -- we have the Sullivan rule -- remind me to tell Judge
18 Sullivan this -- we have the Sullivan rule that I don't let you
19 stand behind the witness --

20 **MR. GARDNER:** We're not going to do that --

21 **THE COURT:** -- and hand the witness a document and
22 then say "How about that? How about that?" As the person
23 looks over their left shoulder.

24 (Laughter.)

25 **THE COURT:** Judge Timothy Sullivan of our court would

1 take exception to that, but that was what I called the Sullivan
2 rule because he would be coming in like a bird over the back
3 shoulder of the witness and it really made the witness nervous
4 after a while. You do have to stand in front of the witness,
5 but I don't care.

6 I really don't care. You can tell there's liberality. I
7 don't care if you sit, stand or whatever.

8 There's no problem with that.

9 **MR. GARDNER:** Thank you, Your Honor. Two more things.
10 The parties internally agreed for a deadline for the exchange
11 of demonstratives. I assume that can stay internal between the
12 parties.

13 **THE COURT:** That's fine. If it works out for you all.

14 **MR. GARDNER:** That's fine. Last thing I just wanted
15 to flag for you. The parties have been working cooperatively.
16 Much of the information that has been produced in discovery in
17 this case has been subject to a protective order.

18 **THE COURT:** Yes.

19 **MR. GARDNER:** The Department of Justice fully
20 recognizes the First Amendment interest here and having as much
21 of this disclosed as possible. There is some limited
22 information, I think the parties largely agree about things
23 like personally-identifiable information about candidates that
24 the parties will redact before putting onto a screen.

25 There may be a few other very discrete items where we are

1 comfortable having them disclosed, but we may not want them on
2 the screen. I think the parties are working collaboratively to
3 try to resolve that and narrow that as much as possible. But I
4 just wanted to flag, in light of this Court's preference to put
5 everything on the screen, there may be a few small things --

6 **THE COURT:** I don't care about that.

7 **MR. GARDNER:** Okay.

8 **THE COURT:** You can just note for whatever reason.
9 You can note that in terms of -- I have no idea as to what
10 public attention is going to be given to this case. And I have
11 no idea in terms of if there are going to be other members of
12 public who are going to watch portions of this trial. So just
13 see how that turns out. That's all.

14 **MR. GARDNER:** Thank you, Your Honor.

15 **THE COURT:** I'll leave it up to you apropos that Rule
16 615, exclusion of witnesses, I'm leaving it up to you all in
17 terms of who's sitting in the courtroom. I'm not going to be
18 able to try to identify who is here or not because there may be
19 some public interest here. And I'll leave it to you, you know,
20 both sides have to note if they see somebody who is one of
21 their witnesses sitting here and they're not supposed to be
22 here. That's why we have a vestibule area outside which works.
23 But I can't monitor that.

24 **MR. GARDNER:** Of course, Your Honor. We will both be
25 vigilant on our sides.

1 **THE COURT:** On that topic, I will note that in terms
2 of confidentiality that we want to try to keep this to a
3 minimum. For example, the references to the Members A, B, C,
4 and D in terms of the standing issue, we -- that material can
5 be sealed and will be sealed in terms of the references.

6 But I really -- I really don't want many things to be
7 sealed here. That is perfectly understandable in terms of
8 their privacy interest to the extent someone can find out who
9 the [REDACTED] student is who is in his [REDACTED],
10 I really don't -- I think it's a stretch to think that someone
11 can identify that person but perhaps not.

12 But, generally, it doesn't -- this case I think will have
13 sufficient attention that I'm really not real excited about
14 having a lot of things be under seal. This is an open
15 courtroom. It's open to the public. It'll generate some
16 public interest. And I really would urge that we all recognize
17 that in terms of the presentation of evidence and the documents
18 are in the record, they're accessible. The court reporter is
19 going to give you all daily copy. And things will go smoothly
20 on this regard.

21 But I'm really not keen on sealing much of what's going to
22 come in this trial. It's as simple as that.

23 **MR. GARDNER:** What we are very conscious about, Your
24 Honor, we obviously want to respect the First Amendment. I
25 think what the parties have agreed to is largely providing

1 redacted copies of things that would identify individuals by
2 name, the personally-identifiable information, which frankly I
3 think both sides agree isn't really pertinent to the issues in
4 this case.

5 So I don't expect, at least from our perspective, there
6 will be any motions to seal. I think, instead, what we would
7 do is simply agree to alternatives, like take certain documents
8 off the screen and things like that, or have more general
9 discussions about topics that might be particularly sensitive.

10 I will just tell you, Your Honor, I think beyond the PII
11 issues, the personally-identifiable information issues, there
12 is a limited degree of sensitivity about being able to
13 understand the process with sufficient detail such that you
14 could basically game the process, right.

15 And you will see things like there's an algorithm that is
16 produced that shows what the whole person multiple is. If you
17 knew what the algorithm was, you would be able to tailor your
18 application to, you know, maximize your likelihood of getting
19 in.

20 Again, I think the parties can work through so that that
21 algorithm is not presented on a screen. I'm not even sure how
22 pertinent the details of that algorithm are to the merits of
23 this case. But that's just an illustrative example of
24 something that I think, I know the Naval Academy is
25 particularly sensitive about.

1 **THE COURT:** Well, this is a public forum.

2 **MR. GARDNER:** Right.

3 **THE COURT:** And I don't think an algorithm can change
4 the ethnic or racial nature of people involved. So I don't
5 know how you're going to camouflage that or deal with that. It
6 is what it is.

7 **MR. GARDNER:** No, not that it would do that. But if
8 you knew how the algorithm worked you would be able to tailor
9 your application to maximize the chances of being admitted and
10 that is the concern.

11 You know, to the extent that both parties have an interest
12 in fairness in the application process, we don't want an unfair
13 advantage.

14 Again, I think these are things that we can address
15 between the parties, but I just wanted to alert you that is the
16 nature of the type of information that may be sensitive, but
17 we're not seeking to seal.

18 **THE COURT:** All right. I understand. The less the
19 sealed the better here. So let's just assume that there's not
20 going to be much sealing going on once the case starts.

21 **MR. GARDNER:** Thank you. That's all I had, Your
22 Honor.

23 **THE COURT:** Mr. Mortara, do you have anything?

24 **MR. MORTARA:** No, Your Honor. I'm sure Madam Clerk
25 and Madam Court Reporter are hungry and so am I.

1 **THE COURT:** That's right. I think they are.

2 Let me just close with one last thing here is that I think
3 this goes without saying, but I really don't -- I really don't
4 think I need to say this, we have very high-quality lawyers
5 here and there's some excellent briefing and I'm looking
6 forward to this case. I don't want this case to be tried in
7 the media. Okay. I really don't. There's no basis to make
8 comments and if the press is covering it, of opinions or this
9 or that or how things are going.

10 I have a fairly thick hide on this sort of thing. One of
11 my former law clerks gave me a plaque where I have my great
12 quote saying, "The greatest preparation for federal trial judge
13 for me was being the quarterback of a losing high school
14 football team." You learn, when you're 16 years old, you learn
15 to take criticism and it's pretty brutal. So I have a thick
16 skin on it.

17 So my hesitancy about the case being tried in the media,
18 it's not me personally. It's just that I'm very proud of the
19 system we have here. I'm very proud of our legal profession.
20 These are rather intense times, and I just want to make sure
21 that everyone on both sides, they understand, this case will be
22 tried in the courtroom. We're going to work hard to get an
23 opinion out within a reasonable period of time, within six or
24 seven weeks, or whatever, and then the case goes up as it goes.

25 I just don't want this case to be tried in the media. I

1 respect all of you and, quite frankly, I have no reason to
2 believe it'll be otherwise. But it's open to the public. The
3 media may or may not cover it, and we'll just leave it at that.

4 And I think it goes without saying that I don't -- I
5 don't, you know, once the case is over, it's over. Once I
6 render my opinion it's done. And then the case moves as it
7 moves.

8 But I just don't want this case to be tried in the media
9 in some way. And I think it goes without saying, but I just
10 would urge that.

11 I will tell you that, particularly for the younger lawyers
12 here, you'll appreciate this, it amazes me, I have a jury trial
13 that I'm picking up again tomorrow, and on Monday it'll go to
14 the jury, and I always talk to the jurors afterwards. And it
15 would be reinforcing for law students and young lawyers
16 particularly to hear what jurors say about how impressed they
17 are with the process. It is not like, almost always, they say
18 this is nothing like what I anticipated. There isn't a judge
19 screaming at the lawyers, there isn't the lawyers screaming at
20 each other. It's much more civilized. They always say that.

21 So I pride myself, and we all do here in the courtroom,
22 and I think it carries over to cases that have a matter of
23 public interest. And the public's entitled to see that we do
24 things in an orderly fashion, that we don't try cases in the
25 newspaper or on the TV screen, and we have results, and it

1 moves forward. And I happen to believe that it still works.
2 But it is obviously subject to some pressures.

3 But you'd be proud to see what the average member of the
4 public thinks when they come in and they leave that, wow, this
5 really is an antiseptic process. Just because it's a bench
6 trial doesn't mean it's any different. And so I just remind
7 anybody of that and I have no reason to believe it would be
8 otherwise. It just goes without saying. And I expressed my
9 appreciation for you all abiding by that.

10 And with a bench trial, just one last thing before we
11 break, obviously I tend to have a hot bench and ask questions
12 at hearings because I believe that's -- when I was trying cases
13 I was always frustrated, if a judge didn't ask anything I
14 thought two things: Either, one, he or she has already
15 decided, or they haven't looked at a word I've written and they
16 have no idea what I'm taking about, they're just not going to
17 put themselves out there.

18 I'm not afraid to put myself out there and ask questions.

19 With a bench trial it's a little different obviously. I
20 think you might find I don't interject as much. Obviously, I'm
21 the finder of fact, I may ask a few questions, but I really
22 don't tend to ask many questions in a bench trial. I try to
23 treat it like a one-person jury up here.

24 But if I think I need to clarify something, I will do it.
25 And I, quite frankly, you can remind me on this if I fail on

1 that, if I'm about to do that, if you say "Can we approach the
2 bench for a minute," I can indicate I'm about to ask the
3 witness this question because it's unclear to me. I don't do
4 it a lot in bench trials, but we only have so many bench
5 trials. And I'm trying to remember the last complex business
6 case I had in a bench trial, and I did ask a few questions
7 because I really didn't understand something from an accounting
8 point of view, for example.

9 So, but you'll find I'm not going to ask many questions
10 and you all have every right to object -- don't forget the
11 rules allow you have every right to object to a question that
12 the Court asks. And you don't waive an objection if you think
13 it's an appropriate question, but I'll make an effort not to do
14 that. I throw that out for what it's worth. Okay.

15 Unless there's anything else, we're finished. I'm looking
16 forward to seeing you all Monday, September 16th at 10:00.
17 We'll start at 10:00, Monday, September 16th. Thank you all
18 very much.

19 (All Counsel - "Thank you, Your Honor.")

20 (Adjourned at 1:32 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, Ronda J. Thomas, Registered Merit Reporter, Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 9th day of September 2024.

Ronda J. Thomas

Ronda J. Thomas, RMR, CRR
Federal Official Reporter

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